
THE INEXORABLE RADICALIZATION OF TEXTUALISM

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Some scholars have recently suggested that textualism, intentionalism, and purposivism are more similar than is generally realized. These new “accommodationist” scholars claim either that the rival methods share the same goals or even that the methods themselves have become indistinguishable. In fact, as this Article shows, not only does textualism differ fundamentally from intentionalism and purposivism, but the gap between them gets wider with time. Textualism’s prime directive—the formalist axiom that statutory text is the law—fundamentally distinguishes textualism from other interpretive methods. Moreover, the formalist axiom has an expansionist logic that causes the gap between textualism and other methods to grow wider as the logical implications of the axiom are worked out. Textualism inexorably radicalizes itself as textualists gradually realize that their axiom compels them to reject moderating influences, such as the “absurd results exception,” that accommodationists claim bring interpretive methods together. Intentionalism and purposivism, by contrast, are less dogmatic and better able to absorb the best lessons of rival methods without being untrue to their core principles. Thus, textualism worsens over time, whereas intentionalism and purposivism are better able to improve themselves over time.

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INTRODUCTION.....	118
I. THE INTERPRETATION WARS AND THE ATTEMPTED TRUCE	123
A. <i>The Molot Accords</i>	125
B. <i>The Nelson Agreement</i>	127
C. <i>Manning Moderates</i>	128
II. THE CORE DIFFERENCE.....	130
A. <i>The Textualists' Prime Directive and the Core</i> <i>Distinction Between Interpretive Methods</i>	131
B. <i>An Allegory and an Example</i>	134
1. <i>An Allegory</i>	135
2. <i>An Example</i>	137
C. <i>The Source of the Problem?</i>	142
III. TEXTUALISM WORKING ITSELF PURE.....	144
A. <i>Absurd Results and Scrivener's Errors</i>	145
B. <i>Consideration of Statutory Purpose</i>	153
1. <i>Limtiaco</i>	157
2. <i>Zuni</i>	161
IV. THE FUTURE OF THE INTERPRETATION WARS.....	168
A. <i>The Future of Textualism</i>	169
1. <i>Textualism's Problem</i>	169
2. <i>Textualism's Useful Lesson</i>	171
3. <i>A Solution for Textualism?</i>	171
B. <i>The Future of Intentionalism and Purposivism</i>	175
CONCLUSION.....	178

INTRODUCTION

For decades, scholars have divided over how best to interpret statutes, particularly when statutory text pulls in one direction and intent or purpose in another.¹ On one side of the resulting "interpretation wars" stand the *textualists*, who believe that the goal of statutory interpretation is to identify the objective meaning of statutory text without regard to what any legislator intended that text to mean.² Arrayed against them are the *intentionalists*, who believe that the goal is for

¹ See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

² See *infra* Part I.

courts to implement the intent of the legislature.³ Also taking the field are the *purposivists*, who believe that the goal is to identify the purpose of a statute and to interpret it to carry out that purpose.⁴ The battles between these methods have raged over decades and have spawned innumerable scholarly commentaries⁵ and judicial clashes.⁶

The latest move in the interpretation wars, however, is to declare something of a truce. Textualism, intentionalism, and purposivism are either not all that different or at least not different in the way people usually think. That is the message in recent articles representing a new wave of scholarship that attempts to reach an accommodation among competing interpretive methods.⁷

Professor Jonathan Molot of Georgetown suggests that the interpretation wars are over—because the textualists won. Textualists, in his view, wrested so many concessions from their rivals that textualism and the other methods converged.⁸ Molot says that “it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism’s adherents and nonadherents.”⁹ Textualists, Molot suggests, should recognize their achievement and declare victory.¹⁰ They should cease to agitate for an “aggressive textualism” that accentuates and radicalizes the differences between them and their opponents.¹¹ Instead, they should embrace the moderate approaches upon which scholars and judges have converged.¹²

Professor Caleb Nelson of the University of Virginia tells a different story, but it shares the feature of calling attention to a purported

³ *Id.*

⁴ *Id.*

⁵ See generally sources cited *supra* note 1.

⁶ See *infra* subsections III.B.1–2. Compare *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (refusing to “alter the text” of a statute in order to satisfy “policy” concerns), *with id.* at 462–63 (Stevens, J., dissenting) (arguing against the majority’s holding on the ground that it “produces absurd results”); *Conroy v. Aniskoff*, 507 U.S. 511, 517–18 (1993) (using legislative history in statutory interpretation), *with id.* at 518–28 (Scalia, J., concurring) (arguing that the majority’s appeal to legislative history was improper in the face of an unambiguous statutory command); *United States v. Locke*, 471 U.S. 84, 93–94 (1985) (adhering to a literal reading of the plain language of a statute), *with id.* at 117 (Stevens, J., dissenting) (arguing that the majority’s reliance on text was “contrary to the intent of Congress”).

⁷ See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005).

⁸ Molot, *supra* note 7, at 35–36.

⁹ *Id.* at 30.

¹⁰ *Id.* at 59.

¹¹ *Id.*

¹² *Id.* at 64.

similarity between rival schools of interpretive thought. Unlike Molot, Nelson does not claim that textualism and intentionalism have converged—he sees important differences between them.¹³ He does, however, suggest that, contrary to popular opinion, the rival methods have the same underlying goal.¹⁴ Textualists, according to Nelson, do not reject the relevance of legislative intent. Rather, both textualists and intentionalists seek to identify and enforce the directives that a legislature *intended* to establish—they just differ regarding how best to do that.¹⁵

This new wave of scholarship poses important questions. Has the gap between textualism and rival interpretive methods really narrowed so much that the methods have converged? Do the methods really share the same interpretive goals?

This Article answers these questions. It explains that textualism pursues a different goal than other interpretive methods. The methods also have not converged. Indeed, as this Article suggests, quite the opposite has occurred.

This Article argues that not only do the rival interpretive methods remain distinct, but the fundamental tenets of textualism cause the gap between interpretive methods to *widen*, not narrow, with time. Textualism's core axiom, this Article shows, causes textualism to make itself progressively more radical and, therefore, less workable. Textualism worsens over time, whereas intentionalism and purposivism are better able to improve themselves over time.

A two-part mechanism causes the inexorable radicalization of textualism. First, the core of textualism is a fundamental, formalist axiom that puts it into inevitable and irreconcilable conflict with other methods. Textualism's fundamental philosophy—its prime directive—is that “[t]he text *is* the law, and it is the text that must be observed.”¹⁶ Once textualists adopt this directive, their war with other methods can never cease.

¹³ Nelson, *supra* note 7, at 372-403.

¹⁴ *Id.* at 348-49, 352-53, 372.

¹⁵ *Id.* at 349, 353-54.

¹⁶ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997) (emphasis added); see also *United States ex rel. Feingold v. AdminalStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (“[T]he text is the law, and it is the text to which we must adhere.”); *United States v. Evans*, 148 F.3d 477, 483 n.8 (5th Cir. 1998) (quoting the statement from Scalia, *supra*); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11

Second, textualism's prime directive has an expansionist quality that causes textualism to become *more* radical with time. The logic of textualism's formalist axiom expands inexorably because the law of interpretation is judge-made law, and judge-made law "works itself pure."¹⁷ Over time, judicial and scholarly efforts uncover and highlight aspects of an area of law that conflict with the area's fundamental axioms. Statutory law can contain contradictions and compromises that result from the give and take of the legislative process. But judge-made law yields over time to the force of logical criticism.¹⁸ Aspects of the law that contradict the law's axioms get driven out.

The implacable force of textualism's prime directive must, this Article argues, ultimately drive out the accommodationist impulses of Professors Molot and Nelson. The "aggressive textualism" that Molot deplores is not the unfortunate result of misguided hotheads who misunderstand the best nature of textualism and who are "bent on radicalizing textualism and keeping the debate alive."¹⁹ It is, rather, the inevitable consequence of taking the first step down the textualist road by accepting the axiom that "the text is the law."

Once this step is taken, textualist purity must inevitably squeeze out the contrary pragmatic accommodations that textualism has traditionally allowed. Traditionally, textualism permitted some exceptions to its strict dogma. It allowed courts to depart from statutory text where the text led to an absurd result²⁰ or resulted from a scrivener's error.²¹ More recently, this Article shows, textualists have started to reject these pragmatic escape valves.²² Ultimately, as the law works itself pure, even consideration of statutory purpose in the resolution of

HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'").

¹⁷ *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 23 (Ch.) (argument of counsel) (emphasis omitted).

¹⁸ See RICHARD A. POSNER, HOW JUDGES THINK 204 (2008) (noting that academic criticism is "potentially a powerful constraint" on judicial behavior because judges care about their reputation and about being good judges).

¹⁹ Molot, *supra* note 7, at 59.

²⁰ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (noting that it is appropriate to depart from statutory text that produces "an absurd, and perhaps unconstitutional, result"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (noting that the absurd results exception "flourished even during the most textually oriented periods of the [Supreme] Court's history").

²¹ See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (noting approval of the "scrivener's error" doctrine); Scalia, *supra* note 16, at 20 (same).

²² See *infra* Section III.A.

ambiguity—long approved within textualism—is being squeezed out by the force of the fundamental axiom.²³

Similarly, textualists can never agree with Nelson that they are just seeking legislative intent by a different method. No amount of interpretive theory can justify this view if the text *is* the law. The drive for textualist purity that is counteracting the convergence of methods perceived by Molot is also contradicting the identity of goals perceived by Nelson.

In the end, therefore, the accommodations sought by Professors Molot and Nelson must fail. In advocating against what he calls “aggressive textualism,” Professor Molot gives the textualists excellent advice, but they cannot take it—at least, they cannot take it without ceasing to be textualists. Textualists must, similarly, reject Professor Nelson’s reformulation of their methods as simply a better way to seek legislative intent. The force of textualism’s fundamental axiom, combined with the tendency of the law to work itself pure, will keep textualists fighting indefinitely.

By contrast, intentionalism and purposivism are better positioned to absorb the best lessons of textualism without being untrue to their own fundamental axioms. Because the prime directives of these other methods are less stark and dogmatic, intentionalism and purposivism can accept useful accommodations with their rival method without being forced to internalize an impossible contradiction. This advantage of intentionalism and purposivism suggests that, should the interpretation wars come to an end, intentionalism and purposivism will be left in possession of the field.

Part I of this Article introduces the Article’s theme by briefly recounting the attempts of Professors Molot and Nelson to achieve an accommodation between textualism and other interpretive methods as well as the answer of Professor John Manning of Harvard to these efforts. Part II demonstrates, however, that there is a core, fundamental distinction between textualism and the other methods. Part III then describes how the logic of the core distinction inevitably expands and squeezes out sensible accommodation of other interpretive impulses. Part IV argues that textualism cannot accommodate the best lessons of other interpretive methods without ceasing to be textualism. This Part concludes that other interpretive methods are better off because they can incorporate the best lessons of textualism without being untrue to their core principles.

²³ See *infra* Section III.B.

I. THE INTERPRETATION WARS AND THE ATTEMPTED TRUCE

In the standard account of the interpretation debate, textualists and other interpreters are at war because of their fundamentally different understandings of the *goals* of statutory interpretation.²⁴ Textualists believe that the goal of statutory interpretation is to determine the objective meaning of statutory text.²⁵ They believe that “[t]he text is the law, and it is the text that must be observed.”²⁶ Quoting Justice Holmes, the textualist says, “We do not inquire what the legislature meant; we ask only what the statute means.”²⁷ Textualists believe that the constitutional process of enactment imbues statutory text with legal force, regardless of what any legislator *understood* or *intended* the text to mean.²⁸

Intentionalists reject this view. The intentionalist regards the goal of statutory interpretation as being to discern and implement the intent of the legislature.²⁹ The intentionalist does not ignore statutory text, but neither does she regard the text as simply *being* the law, independent of the intent behind it, because “in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those *intentions* must be controlling.”³⁰ Thus the intentionalist regards legislative intent—not statutory text—as the ultimate determinant of the law.³¹

²⁴ E.g., Scalia, *supra* note 16, at 16; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998).

²⁵ Nelson, *supra* note 7, at 352; Scalia, *supra* note 16, at 16-17, 22-23; *see also* cases cited *supra* note 16.

²⁶ Scalia, *supra* note 16, at 22.

²⁷ *Id.* at 23 (quoting OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920)).

²⁸ *Id.* at 17, 35.

²⁹ Nelson, *supra* note 7, at 351-52; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281, 301 (1990).

³⁰ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (emphasis added); *see also id.* at 577 (Stevens, J., dissenting) (“In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand.”); *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 164 (1871) (“If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention.” (citing *Brewer’s Lessee v. Blougher*, 39 U.S. (14 Pet.) 178, 198 (1840))).

³¹ As noted above, textualists regularly proclaim that “the text is the law.” It is less common for intentionalists to say that “the intent is the law.” In the famous *Chevron* case from administrative law, the Supreme Court did make the frequently quoted

Yet another approach is the method of purposivism, under which a court interpreting a statute should "[d]ecide what purpose ought to be attributed to the statute and . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can."³² Statutes, purposivists believe, should "be presumed to be the work of reasonable [people] pursuing reasonable purposes reasonably."³³ The meaning of a statute can "never [be] plain unless it fits with some intelligible purpose."³⁴

One would naturally expect that, with such different understandings of the *goals* of interpretation, different interpreters would use different *methods* of interpretation and frequently come to different results.³⁵ The debate would be primarily between textualists on the one side and intentionalists and purposivists on the other. Textualists would follow the meaning of statutory text wherever it leads, without concerning themselves with whether that meaning matches the meaning intended by the enacting legislature or whether it serves the legislature's purpose. Intentionalists, by contrast, would be alert to potential incongruence between textual meaning and legislative intent and would be guided by the latter where the two could be shown to differ. Purposivists would not approve understandings of even apparently clear text that do not fit some intelligible purpose.

statement that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, *that intention is the law* and must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (emphasis added). But *Chevron* was more a statement about the distribution of power between the legislature and the executive than a statement about how to interpret the commands of the legislature. The case is not generally understood as commanding courts to adopt intentionalism as an interpretive method, and one should not put too much weight on the choice of words in this one sentence.

³² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Hart and Sacks immediately add the qualification that the court should make sure "that it does not give the words . . . a meaning they will not bear." *Id.* Also, the purposivist does not seek simply to carry out the intention of the legislature with respect to the question at issue in a given case, but the purposivist does focus on statutory purposes and believes that statutes must be presumed to be purposive acts. *Id.* at 1124.

³³ *Id.* at 1125.

³⁴ *Id.* at 1124 (italics omitted).

³⁵ For an extended argument to the contrary, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006). Vermeule argues that textualists and intentionalists could "bracket" their disagreement about goals because, given the empirical uncertainty about the usefulness of different methods, they should reach the same conclusions about the best methods regardless of which of their goals is correct. *Id.* at 2, 7.

Interpretive differences have, indeed, led to a seemingly endless battle among interpretive methods, most notably about whether courts may consult legislative history,³⁶ but also about a wide variety of other methodological points.³⁷ Recently, however, a new breed of scholars—let us call them “the accommodationists”—has focused on similarities among, rather than differences between, the rival methods. Accommodationists have claimed either that textualism and intentionalism share the same goals or even that the methods themselves are indistinguishable—that the war is over, the methods have converged, and the whole matter is hardly even worth thinking about.

A. *The Molot Accords*

My erstwhile colleague Jonathan Molot offers a truce in the interpretation wars. He suggests that the wars are over, and that textualism has prevailed. Textualism, he argues, successfully moderated intentionalism and purposivism—so much so, in fact, that “it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism’s adherents and nonadherents.”³⁸

Molot argues that textualists succeeded by undermining the premises of “strong” intentionalism and purposivism.³⁹ When judges interpret a statute so as to fulfill its statutory purpose, they necessarily assume that the statute *has* a purpose. Textualists rejected this premise.⁴⁰ They relied on a legal-realist analysis of actual legislative practices.⁴¹ Because statutes are enacted by a multimember legislature, attribution of purpose to a statute may be unrealistic. The legislative majority that voted for a statute may be made up of legislators serving different purposes.⁴² Moreover, compromise is inherent in the legisla-

³⁶ See Siegel, *supra* note 24, at 1029-30 (noting that much of the interpretation debate focused on this conflict).

³⁷ Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 98-108 (2001) (contending that judges cannot engage in “equitable interpretation” of a statute), with William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (responding to Manning’s argument).

³⁸ Molot, *supra* note 7, at 30.

³⁹ *Id.* at 29-30. Molot uses the term “purposivism” to cover both purposivism and intentionalism. *Id.* at 3 & n.2.

⁴⁰ See *id.* at 25.

⁴¹ *Id.*

⁴² *Id.* at 28.

tive process, and compromise typically dilutes statutory purpose.⁴³ Therefore, textualists observed, any “purpose” attributed to a statute may be a mere construct—and a dangerous construct, too, for once judges are permitted to bend statutory language in the name of statutory purpose, the way is open for judges to enforce a “purpose” that really reflects nothing more than their own policy preferences.⁴⁴ Textualists made similar observations about the danger of attributing an “intent” to a multimember legislature.⁴⁵

The force of these textualist attacks, Molot observes, compelled intentionalists and purposivists to moderate their methods, drawing those methods closer to those of textualists.⁴⁶ Moreover, Molot claims, textualists, on their own part, moderated *their* methods, and drew themselves closer to the intentionalists and purposivists, by recognizing the importance of context in the interpretation of text. Textualists rejected the simplistic idea that courts should follow the “plain meaning” of statutory text and recognized that text has meaning only in context.⁴⁷ Modern textualists therefore look to context as well as text and also look to statutory purpose to resolve statutory ambiguity.⁴⁸

Thus, on the one hand, intentionalists and purposivists were alerted to the dangers of attributing intent and purpose to legislative product. On the other hand, textualists recognized the importance of using context to interpret text. The result, Molot says, is that the rival methods converged.⁴⁹ To the extent that anything remains of the debate, Molot suggests that the difficulty lies with “aggressive textualists” who, perhaps yearning for the days of their glorious conquest of other interpretive methods, are “bent on radicalizing textualism and keeping the debate alive.”⁵⁰ These extremists, in a misguided effort to deny the creativity inherent in the interpretive process, wrongly find clarity in statutory text where it does not exist.⁵¹ Instead of trying to accen-

⁴³ *Id.*

⁴⁴ *Id.* at 25.

⁴⁵ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”).

⁴⁶ Molot, *supra* note 7, at 30-31.

⁴⁷ *Id.* at 34-35.

⁴⁸ *Id.* at 35.

⁴⁹ *Id.* Molot suggests that there are still some differences among the schools of thought regarding *how* interpreters should consult context, but he regards these differences as minor. *Id.* at 36-40.

⁵⁰ *Id.* at 59.

⁵¹ *Id.* at 48-51.

tuate the differences between interpretive methods, textualists should, Molot magisterially advises, declare victory, embrace the moderate approach that their critiques have engendered, and move on to new issues.⁵²

In sum, Molot maintains that “[t]extualism has outlived its utility as an intellectual movement.”⁵³ The war is over, and it is difficult even to identify any remaining ground between the combatants.⁵⁴ The very question of what is at stake is “clouded,”⁵⁵ and the whole interpretation debate “no longer is important enough to warrant our attention.”⁵⁶

B. The Nelson Agreement

Professor Nelson provides a different perspective than that of Professor Molot, but he shares the view that textualism and intentionalism have similarities that are not generally recognized. In particular, Nelson denies the assertion made above⁵⁷ that textualists and intentionalists differently perceive the *goal* of statutory interpretation. Nelson, unlike Molot, perceives substantial differences between textualist and intentionalist methods, but he does not see these differences as stemming from different goals. Nelson asserts that textualists, like intentionalists, “seek to identify and enforce the legal directives that an appropriately informed interpreter would conclude the enacting legislature had *meant* to establish.”⁵⁸

Nelson attempts to prove this by looking to textualists’ actual technique. Textualist *rhetoric*, Nelson acknowledges, “does not emphasize” devotion to legislative intent (which is putting it mildly),⁵⁹ but actual textualist practice includes, for example, judicial correction of scrivener’s errors—that is, replacement of obviously erroneous statutory text with text the legislature *intended* to enact.⁶⁰ Similarly, textualists employ certain presumptions in their interpretation of statutory

⁵² *Id.* at 59-60, 69.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 4.

⁵⁷ See *supra* notes 24-31 and accompanying text.

⁵⁸ Nelson, *supra* note 7, at 353-54 (emphasis added).

⁵⁹ *Id.* at 354. Nelson recognizes that textualists “might not embrace” his description of their approach, *id.* at 417, which is also putting it mildly. Leading textualists deny the very existence of the legislative intent that Nelson claims they seek to implement. *E.g.*, Easterbrook, *supra* note 45, at 68.

⁶⁰ Nelson, *supra* note 7, at 356.

text that can only be regarded as intent-seeking tools, such as the presumption against statutory redundancy, which makes sense on the ground that a legislature probably did not *intend* to include superfluous provisions in a statute.⁶¹ Textualists also permit consideration of purpose in statutory construction, and purpose is relevant because it sheds light on what a legislature *meant*.⁶² These and similar points suggest that textualists ultimately seek to implement legislative intent.

Thus, in Nelson's view, a survey of actual textualist practices demonstrates that the debate between textualists and intentionalists is not really about the *goal* of interpretation but about the best *means* of achieving the goal.⁶³ The real difference between textualists and intentionalists, Nelson concludes, is that textualists seek to achieve their goal of divining legislative intent using a relatively "rule-based" methodology, whereas intentionalists have more faith in the sound exercise of judicial judgment.⁶⁴ Nelson suggests that this different preference between rules and standards, rather than different goals, best explains the methodological differences between textualists and intentionalists. Nelson believes that both kinds of interpreters ultimately seek to implement legislative intent.⁶⁵

C. Manning Moderates

Professor John Manning, a leading academic textualist, has responded to both Molot and Nelson.⁶⁶ Notably, although Manning dis-

⁶¹ *Id.* at 355.

⁶² *Id.*

⁶³ Even with regard to the most noted distinction between the methods, the textualists' rejection of legislative history, Nelson sees the issue as arising primarily from a disagreement about legislative history's reliability rather than its legitimacy. *Id.* at 362-63. Nelson recognizes that textualists also apparently object to legislative history as illegitimate, but he sees this as a repackaging of their concern about reliability. *Id.* at 364-65.

⁶⁴ See *id.* at 372-73 (arguing that this contrast is capable of generating most of the methodological debates between textualists, who incline toward the rule-based approach, and intentionalists, who favor the more holistic approach). This textualist preference for rules, Nelson suggests, applies both to the textualists' preference for applying fixed rules of statutory interpretation rather than a looser holistic approach and to their preference for interpreting statutes so that the statutes themselves impose rules, as opposed to standards. *Id.*

⁶⁵ See *id.* at 373 ("[T]he methodological differences between judges whom we think of as textualists and judges whom we think of as intentionalists might relate less to the basic goals of interpretation than to the assumptions and attitudes that interpreters bring to their common task.").

⁶⁶ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423-26 (2005) [hereinafter Manning, *Nelson Response*]; John F. Manning, *What Divides Textual-*

agrees with both of them, his responses share some of their theme of accommodation.

Manning, answering Nelson, does not agree that textualists really seek to implement legislative intent.⁶⁷ Textualists, Manning says, regard legislative intent as a construct. The “intent” they seek to implement is what Justice Scalia calls the “objectified” intent, which is different from the subjective intent that intentionalists seek to implement.⁶⁸ In responding to Molot, Manning contends that “significant practical and theoretical differences persist” between textualism and other schools of thought.⁶⁹ Manning recognizes that both kinds of interpreters respect the importance of context but argues that textualists give primacy to “semantic context” over “policy context.”⁷⁰ Thus, where “contextual evidence of semantic usage points decisively in one direction,” Manning says that the textualist (splitting from the purposivist) will accept the interpretation dictated by that evidence, even if it conflicts with the result that policy considerations would dictate.⁷¹

Nonetheless, while differentiating himself from Molot and Nelson, Manning shares their appreciation for the overlap between the different schools. Manning agrees that modern textualists do not expect to discover a statute’s meaning by looking exclusively “within the four corners” of the statute.⁷² They recognize that “context is everything,”⁷³ and they are willing to look to authoritative evidence of meaning that lies outside statutory text.⁷⁴ Textualists also recognize the importance of considering statutory purpose and the mischief a statute was designed to address.⁷⁵ And purposivists, Manning observes, rely on many textualist methods.⁷⁶

ists from Purposivists?, 106 COLUM. L. REV. 70, 75-76 (2006) [hereinafter Manning, *Molot Response*].

⁶⁷ See Manning, *Nelson Response*, *supra* note 66, at 423.

⁶⁸ See *id.* at 421, 423-24 (noting that textualists seek “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*” (internal quotation marks omitted) (quoting Scalia, *supra* note 16, at 17)).

⁶⁹ Manning, *Molot Response*, *supra* note 66, at 91.

⁷⁰ *Id.* at 92-93.

⁷¹ *Id.*

⁷² *Id.* at 79 (internal quotation marks omitted) (quoting *White v. United States*, 191 U.S. 545, 551 (1903)).

⁷³ *Id.* at 80 (internal quotation marks omitted) (quoting Scalia, *supra* note 16, at 37).

⁷⁴ *Id.* at 81-83.

⁷⁵ See *id.* at 84 (“[T]extualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing. Thus, when a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the sta-

It would be too much to label Manning as an accommodationist of the same order as Molot or Nelson. Manning is a textualist. But even this leading textualist pays considerable attention to the overlaps between interpretive methods.

II. THE CORE DIFFERENCE

The accommodationists are attempting to show that textualism shares the goals or methods of other schools of statutory interpretation. But they are mistaken. Professor Molot goes so far as to claim that "it is hard to tell what remains of the textualism-purposivism debate."⁷⁷ But, in fact, it is easy to tell. Textualism and other interpretive methods differ in the most basic, fundamental way.

The vital distinction between textualism and other interpretive methods is perhaps difficult to appreciate if one focuses primarily on cases in which statutory text is less than clear and the choice between adhering to textualist purity and paying attention to contextual clues is finely balanced.⁷⁸ A better way to see the differences is to start with the core distinction between the methods and work outward. This Part therefore focuses on the core distinction. Not only does this approach lead to a better picture of the issues that separate interpretive methods but, as the next Part suggests, it mirrors the line of methodological and doctrinal development that keeps the methods distinct: the uncompromising nature of the textualists' prime directive first creates the core distinction and then spreads outward to affect more and more cases as the law works itself pure.⁷⁹

tute's apparent overall purpose." (footnotes omitted)); *see also* Manning, *supra* note 20, at 2408 ("[T]extualists believe it is appropriate, if not necessary, for an interpreter to consider a statute's apparent background purpose or policy implications in choosing among competing interpretations.").

⁷⁶ *See* Manning, *Molot Response*, *supra* note 66, at 85-91 ("Contrary to popular perception, prevailing methods of purposivism rely on many of the methods that textualists hold dear.").

⁷⁷ Molot, *supra* note 7, at 3.

⁷⁸ *See, e.g., id.* at 66-68 (examining *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), cases in which the statutory text at issue was not starkly clear).

⁷⁹ *See infra* Part III.

A. *The Textualists' Prime Directive and the Core
Distinction Between Interpretive Methods*

The core distinction between interpretive methods is not a secret. Textualists proclaim it proudly. Only strong efforts at accommodation can obscure what is staring us in the face.

The core distinction is this: textualists believe that the text of a statute *is* the law. This belief is the textualists' prime directive. As Justice Scalia puts it, "The text is the law, and it is the text that must be observed."⁸⁰ Textualists believe that a statute's passage through the constitutional process—the passage of the same statutory text by the two houses of Congress and either its signature by the President or the overriding of the President's veto—imbues *that text* with legal force, regardless of what anyone intended and regardless of what purpose anyone tried to achieve. Again, as the textualists put it, "[w]e do not inquire what the legislature meant; we ask only what the statute means."⁸¹

This core point can, it is true, sometimes be a little difficult to discern because of the dualistic nature of textualism. Textualism has two faces. One is realist and one is formalist.

On the one hand, textualism is a *realist* attack on intentionalist and purposivist premises. As Manning, Molot, and Nelson correctly explain, the textualist movement provided powerful reasons to doubt some of the theoretical premises underlying intentionalist and purposivist methods. Textualists grounded these reasons in their appraisal of the realities of the legislative process.

Textualists attacked the intentionalist premise that courts are empowered to discover and implement "legislative intent" and that such intent is the ultimate determinant of statutory meaning.⁸² Textualists argued that this intentionalist postulate does not reflect the realities of the legislative process. Textualists observed that because a legislature is a multimember body, it may be unrealistic to assume that it has a collective "intent" on any particular issue. Such an assumption, textualists observed, inappropriately anthropomorphizes the legislature and ignores its true nature.⁸³ Textualists criticized intentionalist re-

⁸⁰ Scalia, *supra* note 16, at 22.

⁸¹ *Id.* at 23 (quoting HOLMES, *supra* note 27, at 207); *see also id.* at 22-23 ("I don't care what their intention was. I only want to know what the words mean." (internal quotation marks omitted) (quoting an unpublished letter by Justice Holmes)).

⁸² *See* Manning, *Nelson Response*, *supra* note 66, at 419-20.

⁸³ *See id.* at 420, 423; Molot, *supra* note 7, at 28 ("Because legislation has no single author, but instead is enacted by many different officials, textualists could deny the existence of coherent statutory purposes without embracing a radical postmodern view

liance on legislative history on similarly realist grounds: they argued that a committee report or floor statement at most shows the views of a particular committee or individual member of Congress and may not reflect the views of the whole, multimember Congress.⁸⁴ Textualists also criticized legislative history as being indeterminate, multifarious, and endlessly manipulable, thus making it just as likely in practice to confuse as to help judges,⁸⁵ and also as giving judges a ready tool with which to enforce their own personal preferences by plucking out those snippets of legislative history that favor them.

Textualists make a similar realist attack on purposivism. Professors Hart and Sacks, the canonical expositors of purposivism,⁸⁶ exhort courts to assume that statutes are the work of "reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear."⁸⁷ But textualists observe that this assumption may be unrealistic. The cumbersome legislative process, with its many "veto gates," usually ensures that purposes are not "seamlessly transl[ed]" into legislation.⁸⁸ Interest-group politics and the give and take of the legislative process produce compromises, including potentially unprincipled compromises, and even statutes that pursue no reasonable purpose but simply transfer wealth to powerful groups.⁸⁹ Unprincipled interest-group compromises may also take place out of sight and may leave no mark on the legislative record.⁹⁰ Assuming that

regarding indeterminacy of language."); see also Easterbrook, *supra* note 45, at 68 ("Intent is elusive for a natural person, fictive for a collective body. . . . [N]o 'meaning' . . . can be imputed to the legislature.").

⁸⁴ See Manning, *Nelson Response*, *supra* note 66, at 420; Scalia, *supra* note 16, at 32.

⁸⁵ See, e.g., Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1838 (1998) (questioning judicial competence to discern legislative intent from legislative history given structural features of the judicial process).

⁸⁶ See Manning, *Molot Response*, *supra* note 66, at 86 (noting the canonical status of Hart and Sacks); see generally HART & SACKS, *supra* note 32.

⁸⁷ HART & SACKS, *supra* note 32, at 1124-25.

⁸⁸ Manning, *supra* note 20, at 2416-17; see also Manning, *Molot Response*, *supra* note 66, at 103.

⁸⁹ See Manning, *Molot Response*, *supra* note 66, at 104 ("Whatever else might be said of the legislative process, it is quite clear that, in aggregate, the complex legislative procedures create many opportunities for legislators, committees, or minority coalitions to slow or stop the progress of legislation, often if not always making some form of compromise essential to the bill's ultimate passage."); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334-35 (1990) (noting how public-choice theory, interest-group theory, and more traditional institutional political theory posit that the legislative process fails to produce statutes reflecting legislative purpose or intent).

⁹⁰ See Manning, *supra* note 20, at 2411-12.

statutes are the work of “reasonable men pursuing reasonable purposes reasonably” may therefore lead courts to reach incorrect conclusions about statutory meaning.

The undeniable strength of these realist attacks on intentionalist and purposivist methods had a noticeable impact on interpretive practices. This strength accounts for the “convergence of opinion” that Molot observes⁹¹ and my own prior observation that “[i]n a significant sense, we are all textualists now.”⁹² Intentionalists and purposivists have absorbed the valuable lesson that textualism’s realism offered: they recognize that judicial reliance on legislative history, enforcement of legislative intent, or enforcement of statutory purpose can be fraught with peril for the reasons the textualists offered. That is not to say that they have ceased these practices, but it is to say that they engage in them with more caution and with more respect for the importance of statutory text.⁹³

Hence, if that were all there were to textualism—if textualism were solely a realist attack on intentionalist and purposivist premises—Professor Molot might be correct. The war could be over; textualism, triumphant.

But that is not all there is to it. Textualism is not solely a realist attack on intentionalism and purposivism. It has another face. Textualism is also a *formalist* statement. It is a theoretical, doctrinal, and philosophical declaration regarding the nature of statutes and statutory interpretation.

Textualists do not merely say that statutory text is important because other indicators of legislative intent are murky and unreliable. They proclaim that statutory text is important because of what may be called the “formalist axiom” of textualism, namely, that “the text *is* the law.”⁹⁴ Legislative intent is not only obscure, it is irrelevant.⁹⁵ Pointing to the constitutional process for statutory enactment,⁹⁶ textualists observe that the houses of Congress vote only for a *text*, not for an intent

⁹¹ Molot, *supra* note 7, at 35.

⁹² Siegel, *supra* note 24, at 1057.

⁹³ See Molot, *supra* note 7, at 32-33 (noting that “textualism has had a measurable impact on judges and Justices who do not include themselves among textualism’s adherents” and that such judges now “heed textualism’s warnings about the pitfalls of strong purposivism” and have “alter[ed] their approach to statutory interpretation”).

⁹⁴ Scalia, *supra* note 16, at 22 (emphasis added).

⁹⁵ See *id.* at 22-23 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 57 COLUM. L. REV. 527, 538 (1947)).

⁹⁶ See, e.g., *id.* at 35 (“A statute . . . has a claim to our attention simply because Article I, Section 7 of the Constitution provides that since it has been passed by the prescribed majority . . . it is a law.”).

or a purpose.⁹⁷ Textualists believe that the passage of text through the constitutional process of enactment imbues that text with legal force, regardless of anyone's intent or purpose.⁹⁸

The formalist axiom sharply distinguishes textualism from intentionalism or purposivism. Its force goes beyond realist and institutional analysis of the legislature that calls intentionalist and purposivist premises into question. The formalist axiom proclaims that even if intentionalist and purposivist premises were wholly consistent with actual facts—even if courts could perfectly discern congressional intent or purpose—it would make no difference. Courts must disregard legislative intent and purpose whenever they clash with statutory text, because the text *is* the law.

B. *An Allegory and an Example*

Accommodationist scholars such as Molot and Nelson would probably object to the preceding description of textualism as unfair. In their articles, they complain that adherents of the different methods tend to “caricature and talk past one another.”⁹⁹ Molot and Nelson might argue that focusing on textualist manifestos such as “the text *is* the law” is not helpful, because such a focus obscures both the process of discerning the meaning of the text¹⁰⁰ and the many accommodations that textualism has made in that process that bring it closer to intentionalism and purposivism.

In particular, accommodationists would note, “textualists have openly acknowledged that text can be ambiguous, that judges must read statutes in context, and that statutory purposes merit consideration in at least some cases.”¹⁰¹ Indeed, according to the accommodationists, textualists have accepted “that language alone is inherently

⁹⁷ See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself. . . .’” (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845))).

⁹⁸ Scalia, *supra* note 16, at 35.

⁹⁹ Molot, *supra* note 7, at 36; see also Nelson, *supra* note 7, at 347-48 (asserting that the “textualist” label “tends toward caricature” and that the rhetoric used to define textualism and intentionalism exaggerates the distinction between the two approaches).

¹⁰⁰ Cf. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“The invocation of ‘plain meaning’ just sweeps under the rug the process by which meaning is divined.”).

¹⁰¹ Molot, *supra* note 7, at 35; see also Nelson, *supra* note 7, at 348 (“[N]o ‘textualist’ favors isolating statutory language from its surrounding context . . .”).

ambiguous”¹⁰² and “that language *only* has meaning when considered in context.”¹⁰³ The view that statutory text simply *is* the law, they might therefore suggest, is unrealistic and incomplete. Text must be interpreted, and the process of interpretation inevitably involves consulting context. This respect for context ameliorates the distinctions between textualism and other interpretive methods.

Unfortunately, this rosy picture is inaccurate. Of course it is true that text, which consists of nothing but marks on a page, has no intrinsic meaning and must be interpreted, and that communication relies on the shared understanding of a linguistic community.¹⁰⁴ In applying the textualist axiom that “the text is the law,” some process must be used to discern the meaning of the text. But that does not mean that the process of interpretation can always narrow the gap between textualism and intentionalism. Attention to context and other interpretive conventions can *sometimes* help bridge the gap between interpretive methods, but sometimes it cannot. In some cases, statutory text, as understood by the community of English speakers, simply has a *meaning*.¹⁰⁵ This meaning may be perfectly clear and yet at odds with likely legislative intent or purpose. In these cases, it is no caricature to point out the irreducible conflict between the textualist axiom that the text *is* the law and the desire to give weight to other interpretive guides, such as legislative intent, purpose, or background principles of law. These cases form the core of the distinction between textualism and other methods, and an understanding of these core cases is crucial.

1. An Allegory

A story from China—possibly apocryphal—helps illustrate the core distinction between textualism and other methods. The story

¹⁰² Molot, *supra* note 7, at 40.

¹⁰³ *Id.* at 35 (emphasis added).

¹⁰⁴ See, e.g., LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS pt. I, §§ 138–242 (G.E.M. Anscombe trans., 3d ed. 1958) (arguing that textual meaning depends on common usage); see also Easterbrook, *supra* note 100, at 536 (citing Wittgenstein for this point).

¹⁰⁵ See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1703 & n.146 (2004) (discussing this point and noting that “texts are sometimes determinate in context”); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 526 (1988) (disclaiming the view that language can be perfectly understood without attention to context, yet asserting that “some number of linguistic conventions, or rules of language, are known and shared by all people having competence in the English language”).

concerns the coinage of the Tang dynasty, which reigned from the seventh to the early tenth centuries, and which issued a coin known as the Inaugural.¹⁰⁶ Many of these coins bear a curious feature: a small, crescent-shaped mark appears on the coin's reverse.¹⁰⁷ Numismatists have long debated the origin and significance of this mark, which has no evident meaning.¹⁰⁸

Although the ultimate explanation for the mark is lost, the commonly accepted story is that the mark resulted from an error. According to the story, before casting the coin, mint officials presented a wax model of the proposed coin to the Empress for approval. As the Empress handled the prototype, one of her fingernails scratched a crescent-shaped mark on the reverse. The Empress approved the coin but returned it to the mint officials with the mark.¹⁰⁹

What were the mint officials to do? The officials determined that the imperially approved coin was the one represented by the wax model—with the crescent-shaped mark. Therefore, they faithfully reproduced the mark in the actual coinage.¹¹⁰

This charming story is perhaps untrue,¹¹¹ but that does not matter. For present purposes, the point is that the story serves as an allegory. It illustrates the philosophical, formalist core of textualism.

The mint officials acted as the allegorical equivalent of textualists. Just as textualists believe that “the text *is* the law,” the mint officials believed that “the wax model *is* the approved coin design.” Once that point was accepted as an axiom, consequences inevitably followed from it. The mint officials, acting as the Empress's faithful agents, did not consider themselves empowered to question whether the Empress *intended* to put the crescent-shaped mark on the coin. They could not speculate whether the *context* of the approval procedure suggested that the mark should be disregarded. Their task was to implement the Empress's decision, as represented by the damaged wax model, without questioning it in any way. Like textualists, they believed that if officially

¹⁰⁶ See 1 PENG XINWEI, A MONETARY HISTORY OF CHINA xlv-xlvii, 249-57 (Edward H. Kaplan trans., 1994).

¹⁰⁷ *Id.* at 250-51.

¹⁰⁸ *Id.* at 252-54.

¹⁰⁹ *Id.* at 252.

¹¹⁰ *Id.*

¹¹¹ Peng states that among historians and numismatists who have debated the origins of the crescent for centuries, the one point of general agreement is that the crescent was first made by an empress's fingernail. *Id.* But he suggests the alternative possibility that the crescent represents the moon and appeared as the result of the influence of foreign coins that bore images of the moon. *Id.* at 252-54.

approved instructions deviated from the instruction-giver's likely intent, their duty was to follow the official instructions.

2. An Example

We may be tempted to smile at the mint officials in the story. But we should not be too smug. In our own time, textualist judges are doing the same thing. Sometimes, when official instructions, this time in the form of statutory text, deviate from the likely intent of the instruction giver, textualists fervently demand faithfulness to the official instructions.

A recent blunder from Congress provides a useful example. It is the verbal equivalent of the Empress's fingernail mark. On the one hand, a recently enacted statute contains an obvious error. On the other hand, if one simply looks at the enacted text, there is no ambiguity about what to do. The text is clear, even though it provides for the opposite of Congress's likely intent. If, like the mint officials in the story, judges perceived their duty as being to implement their official instructions without question, they would be obliged to implement Congress's error.

The statute in question is the Class Action Fairness Act of 2005 (CAFA).¹¹² In several ways, CAFA makes it easier to bring class actions in federal courts. First, the Act loosens the jurisdictional requirements for bringing a class action in federal court based on diversity.¹¹³ The Act also loosens the requirement for *removal* of a class action from state court to federal court.¹¹⁴ Finally, the Act overrides the normal principle that, if a district court determines that it lacks jurisdiction over a removed case and remands the case to state court, the remand order is not appealable.¹¹⁵ A district court's remand of a class action *is*

¹¹² Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). After this Article was drafted, and some four years after the original adoption of CAFA, Congress fixed the error discussed herein, effective December 1, 2009. See Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, §§ 6(2), 7, 123 Stat. 1607, 1608-09 (to be codified at 28 U.S.C. § 1453(c)(1)).

¹¹³ CAFA § 4(a), 28 U.S.C. § 1332(d) (2006). Where the amount in controversy exceeds \$5,000,000, the Act permits a class action based on "minimal diversity"—diversity between any one plaintiff class member and any one defendant—contrary to the normal requirement of "complete diversity."

¹¹⁴ *Id.* § 5(a), 28 U.S.C. § 1453(b). Contrary to normal principles, the Act permits removal without regard to whether any defendant is a citizen of the forum state, and it also permits removal by any one defendant without the consent of other defendants.

¹¹⁵ *Id.* This "normal principle" is established by 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

appealable, although jurisdiction over the appeal is discretionary: the court of appeals may, but is not required to, accept jurisdiction of such an appeal.¹¹⁶

The provision granting jurisdiction over such appeals, however, contains an evident blunder in its provision concerning the timing of such appeals. The Act states that

a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals *not less than 7 days* after entry of the order.¹¹⁷

The statute's language is clear: a party desiring to appeal a district court's ruling on a motion to remand a class action to state court must wait seven days before applying to the court of appeals for permission to appeal. Both intrinsic and extrinsic evidence, however, clearly show that the italicized statutory language is an error. In fact, the language is exactly backwards. Congress meant to say that the district court's ruling could be appealed provided the appeal was taken not *more* than seven days after entry of the order.

This is evident, first, from consideration of purpose. The accepted purpose for the rule that most remand orders are *not* appealable is to avoid delay.¹¹⁸ Defendants are usually happy to see a case delayed, and if a defendant could wrongly remove a case from state court to federal court and then appeal the federal court's remand order, the proceedings could easily fritter away a year or two. CAFA's special rule permitting appeal of remand orders in class actions evidently represents a compromise: Congress meant to permit such appeals but to require them to proceed expeditiously. This would be accomplished if the appellant were required to file the appeal not *more* than seven days after the remand order. To require the appeal to be filed not *less* than seven days after the order would only tend to thwart the purpose of expedition.

The error is also evident from the Senate Report that accompanied CAFA, which confirms this account of CAFA's purpose. The report stated that

¹¹⁶ CAFA § 5(a), 28 U.S.C. § 1453(c)(1).

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting) ("Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand."), *abrogated by* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

[t]he purpose of this provision is to develop a body of appellate law interpreting the legislation *without unduly delaying* the litigation of class actions. . . . New subsection 1453(c) provides discretionary appellate review of remand orders . . . *but also imposes time limits*. Specifically, parties must file a notice of appeal *within* seven days after entry of a remand order.¹¹⁹

Intrinsic evidence from the statute itself further confirms the statutory error and demonstrates that the purpose of the statute's timing rules was to ensure expeditious consideration of appeals of class action remand orders. CAFA contains a highly unusual provision: it requires a court of appeals, if it accepts an appeal of a class action remand order, to resolve the appeal within sixty days.¹²⁰ Normally, of course, there is no time limit on an appellate court's resolution of an appeal, and resolution may take considerably longer than sixty days.¹²¹ It would be paradoxical for Congress to attempt to *speed* the resolution of an appeal with this unique requirement but also to *slow* resolution of the appeal by imposing a mandatory waiting period before the appeal can begin.

Finally, our background understanding of how appeals work also strongly suggests that the statutory text is an error.¹²² Appeal times are invariably stated as a time limit. While there are some situations in which a statute imposes a waiting period before taking action,¹²³ the

¹¹⁹ S. REP. NO. 109-14, at 49 (2005) (emphasis added). This report is actually not part of the "legislative history" of CAFA because it was not finished until after CAFA had already become law. Compare *id.* at 1 (noting that the report was ordered printed on February 28, 2005), with CAFA, Pub. L. 109-2, 119 Stat. 4, 14 (2005) (noting that CAFA was signed into law on February 18, 2005). Judicial consideration of such post-enactment legislative history would offend the constitutional rule against congressional self-aggrandizement. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1520-24 (2000) (arguing against judicial use of postenactment legislative history on grounds that "use of legislative materials is permissible because statutes may be deemed to incorporate them by reference," and that because legislators cannot have relied on and incorporated postenactment legislative history when voting, such text should not be used). But in this case the report only confirms what other indicators already strongly suggest.

¹²⁰ CAFA § 5(a), 28 U.S.C. § 1453(c) (2). Some extensions of this time are allowed, but without the consent of the parties the court can extend the time only by ten days. *Id.* If the appeal is not resolved within the time limits, it must be denied. *Id.* § 5(a), 28 U.S.C. § 1453(c) (3).

¹²¹ See, e.g., *FDIC v. Craft*, 157 F.3d 697, 697 (9th Cir. 1998) (providing an example of an appeal resolved more than four years after oral argument).

¹²² See generally Siegel, *supra* note 24 (arguing for judicial use of background understandings as a guide to statutory interpretation).

¹²³ See, e.g., 29 U.S.C. § 626(d) (2006) (imposing a sixty-day waiting period after filing a charge with the Equal Employment Opportunity Commission before bringing a suit under the Age Discrimination in Employment Act); 42 U.S.C. § 2000e-5(f)(1)

time to appeal a court's ruling to a higher court is always a time limit, never a waiting period.¹²⁴ Giving effect to CAFA's literal language would not only create a unique waiting period before appealing, but it would create the unique situation in which the appeal would not be subject to any apparent time limit.¹²⁵

Thus, the Senate Report, the special statutory sixty-day rule, the purpose of the statute, and our background knowledge of how appeals work all strongly indicate that the statutory phrase "not less than 7 days" is an error. The language should read "not *more* than 7 days." A drafting error produced text that means exactly the opposite of what Congress intended.¹²⁶

As a result, the statute provides an excellent illustration of the fundamental, irreducible distinction between textualism and other methods of statutory construction. The statutory language is inescapably clear. Contrary to the accommodationist suggestion that text alone is inherently ambiguous and has meaning only when considered in context,¹²⁷ this statutory text, as understood by speakers of the English language, has a determinate meaning. No amount of attention to context,¹²⁸ no application of any background interpretive convention,¹²⁹ and no rejection of wooden literalism¹³⁰ will transform "less" into "more." The statutory language means what it says. A textualist judge who believed that "the text *is* the law" would be bound to apply the text as written.¹³¹

(2006) (establishing a similar 180-day waiting period before bringing suit under Title VII of the Civil Rights Act of 1964).

¹²⁴ See, e.g., 28 U.S.C. § 1292(b) (imposing a ten-day appeal period for discretionary interlocutory appeals); *id.* § 2101(a) (imposing a thirty-day appeal period for cases subject to direct appeal to the Supreme Court); *id.* § 2107(a) (imposing a thirty-day appeal period from entry of judgment in district court in civil cases); *id.* § 2107(b) (imposing a sixty-day appeal period in cases in which the United States is a party); FED. R. APP. P. 4(b)(1) (imposing a ten-day appeal period for criminal cases).

¹²⁵ See *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005) (noting the "seven-day waiting period followed by a limitless window for appeal").

¹²⁶ See Adam N. Steinman, "Less" Is "More"? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1187-89 (2007) (noting that this provision in CAFA is the opposite of what Congress meant, as made clear by the fact that "CAFA is accompanied by uniquely reliable evidence of legislative intent").

¹²⁷ See, e.g., Molot, *supra* note 7, at 35, 40.

¹²⁸ See Manning, *supra* note 20, at 2458-65.

¹²⁹ See *id.* at 2465-76.

¹³⁰ *Id.* at 2392-93; Molot, *supra* note 7, at 34-35; Scalia, *supra* note 16, at 23.

¹³¹ Of course, some textualists would escape this result by applying the "absurd results" exception. See *infra* Part III.

Moreover, lest the reader think this analysis an unfair caricature that even the staunchest textualist would reject, the fact is that some textualist judges have, with no little fervor, advocated exactly that. CAFA has sharply divided textualist and other interpreters.

No fewer than five courts of appeals that have addressed CAFA's textual problem have concluded that, in CAFA, "less" is "more."¹³² Rejecting pure textualism, these courts relied on statutory purpose, legislative intent, and legislative history.¹³³ Dissenting from such a ruling, however, the Ninth Circuit's Judge Bybee, joined by five other circuit judges (including the well-known textualist, Judge Kozinski¹³⁴), wrote an extensive textualist opinion. Judge Bybee emphasized the "paramount principle of statutory construction that '[w]here [a statute's] language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'¹³⁵ Judge Bybee would have applied the statute as written.

Thus, Judge Bybee, like the Chinese mint officials, regarded his duty as doing exactly what his official instructions said, without question. Indeed, he had harsh words for his colleagues who did otherwise. He concluded that "[t]he Republic will certainly survive this modest, but dramatic, emendation of the United States Code; I am not so sanguine that in the long term it can stand this kind of *abuse of our judicial power*."¹³⁶

¹³² Estate of Pew v. Cardarelli, 527 F.3d 25, 27-28 (2d Cir. 2008); Morgan v. Gay, 466 F.3d 276, 279 (3d Cir. 2006); Miedema v. Maytag Corp., 450 F.3d 1322, 1326 (11th Cir. 2006); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1146 (9th Cir. 2006), *reh'g denied*, 448 F.3d 1092 (9th Cir. 2006); Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). But see Spivey v. Vertrue, Inc., 528 F.3d 982, 983-85 (7th Cir. 2008) (taking a slightly different approach that allows appeals within seven days but does not reject appeals after seven days). The courts have not held that "less" means "more"; they have held that the statute should be implemented *as though* it contained the word "more" rather than "less."

¹³³ See, e.g., *Amalgamated Transit Union*, 435 F.3d at 1146; *Pritchett*, 420 F.3d at 1093 n.2.

¹³⁴ For a sample of Judge Kozinski's views, see generally Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998).

¹³⁵ *Amalgamated Transit Union*, 448 F.3d at 1096 (Bybee, J., dissenting) (internal quotation marks omitted) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

¹³⁶ *Id.* at 1095 (emphasis added). Judge Bybee's suggestion that the majority opinion amounted to an abuse of power is particularly striking when one remembers that he is the same person who, in his previous capacity as Assistant Attorney General for the Office of Legal Counsel, signed the "torture memo" that declared that the President could disregard a statutory prohibition against torture—presumably without, in Bybee's opinion, abusing any power. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 46

The CAFA error and the cases construing it demonstrate the core, irreducible distinction between textualism and other methods of statutory construction. It shows that textualists do not seek, as Professor Nelson claims, to discern and implement legislative intent. It shows that Professor Molot is wrong to claim that it is “hard to tell what remains of the textualism-purposivism debate.”¹³⁷ It is easy to tell. Nor is it “difficult for textualists to identify, let alone conquer, any territory that remains between textualism’s adherents and nonadherents.”¹³⁸ It is easy to identify the disputed territory. The dispute is this: textualists believe that the text *is* the law. Other interpreters do not.

C. *The Source of the Problem?*

Why do accommodationists not see this obvious distinction between textualism and other interpretive methods? How can Professor Nelson assert that textualists and intentionalists give interpreters “the same basic marching orders . . . to identify and enforce the legal directives that an appropriately informed interpreter would conclude the enacting legislature had *meant* to establish”?¹³⁹ Part of the difficulty may lie in the accommodationists’ tendency to focus on particular potential sources of interpretive dispute. Accommodationists often highlight interpretive disputes that arise, for example, as a result of legislatures drafting statutes using general terms that, in some later case, capture particular circumstances that a court might believe are beyond the legislature’s likely intent. The legislature chooses to adopt a “rule” rather than a “standard,” and, either because of the legislature’s failure to appreciate the generality of its rule or because of its failure to anticipate developments over time, application of the rule yields unpalatable results in particular cases.

Manning, for example, asserts that statutory “absurdity arises from the problem of statutory generality.”¹⁴⁰ He therefore concludes that sensitive consideration of context can help solve problems caused by apparent statutory absurdity. But while there is no doubt that interpretive difficulties *sometimes* arise from the clash between general statutory terms and the particular circumstances to which such terms lat-

(Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

¹³⁷ Molot, *supra* note 7, at 3.

¹³⁸ *Id.* at 30.

¹³⁹ Nelson, *supra* note 7, at 353-54 (emphasis added).

¹⁴⁰ Manning, *supra* note 20, at 2459 & n.263.

er apply—a point noted as early as Aristotle¹⁴¹—this is hardly the *only* source of such difficulty. Another source, which I have highlighted in previous writings, is simple statutory error.¹⁴² The furious pace of business in Congress guarantees that statutory drafting errors are not especially rare occurrences; they happen all the time.¹⁴³

Flat-out statutory errors, of the kind that obviously occurred in the drafting of CAFA, are particularly likely to highlight the core difference between textualism and other methods. As the CAFA example shows, in such cases there may be no need to quibble about the level of generality with which one should approach the statutory text, to wonder about whether the text embodies a rule or a standard, or to consider the sensitive application of context. The statutory text has a clear and unequivocal meaning; the meaning is simply wrong because of a drafting error. An interpreter who has accepted the textualist axiom that the text *is* the law is stuck. An intentionalist or purposivist judge would at least consider the possibility of correcting Congress's obvious error.¹⁴⁴ CAFA shows that there are still fundamental differences between textualism and other methods, differences that starkly

¹⁴¹ Aristotle argued against textualism when he recommended that “in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement.” ARISTOTLE, *NICOMACHEAN ETHICS* § 1137b, at 142 (Martin Ostwald trans., 1962). Aristotle relied on the intentionalist principle that “[s]uch a rectification corresponds to what the lawgiver himself would have said if he were present, and what he would have enacted if he had known [of this particular case].” *Id.*

¹⁴² See generally Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

¹⁴³ See, e.g., *id.* at 358 & n.221.

¹⁴⁴ In the case of CAFA, even an intentionalist or purposivist might decide, in the end, to apply the statute as written. Reading the statute as though it said “not *more* than 7 days” would, one can be confident, implement the legislative intent, but it would turn the statute into a dangerous trap for the unwary litigant. An intentionalist reading of statutory text would often have the effect of *removing* a trap for the unwary, see, e.g., *United States v. Locke*, 471 U.S. 84, 117-19 (1985) (Stevens, J., dissenting), but in this case it would create one. A lawyer checking the statute to see when to file an appeal from a district court's ruling on a remand motion in a class action would be in danger of losing the right to appeal altogether. If the lawyer simply did what the statute said and applied for permission to appeal after first waiting seven days, the appeal would, under the proposed statutory reading, be jurisdictionally out of time. In light of this problem, a court might well conclude that the statute does not pose an appropriate occasion for judicial reform of statutory text and that it would be better to put up with the incongruities produced by applying the statute as written. See *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 984-85 (7th Cir. 2008).

affect cases where difficulties with statutory text have nothing to do with levels of generality.¹⁴⁵

A similar observation applies to Molot's highlighting of the recognition by textualists of the limitations of the old "plain meaning" version of textualism as one reason for interpretive convergence. Molot says that everyone, including textualists, now recognizes that statutory texts do not have an "inherent meaning" that can be understood without consideration of context.¹⁴⁶ That may be true, but, as CAFA demonstrates, it may also be irrelevant. Even if we all now understand that statutory text lacks "inherent" meaning, statutory text may be so clear that everyone would agree on what it means. The question may not be whether the text should be understood in context because consideration of context may have no impact on the meaning of the text. The question, as with CAFA, may simply be whether "the text is the law" and whether judges are bound to follow it.

In any event, whatever the reason, accommodationists have misperceived the core, fundamental distinction between textualism and other interpretive methods. The fundamental distinction is embodied in the textualists' formalist axiom that statutory text *is* the law.

III. TEXTUALISM WORKING ITSELF PURE

The preceding Part described the core distinction between textualism and other interpretive methods. But perhaps, the reader might think, the distinction makes little practical difference. Perhaps the core distinction affects only "core" cases. Perhaps such cases arise only infrequently. Perhaps textualism also moderates itself by permitting exceptions to its apparently inflexible principles and by paying attention to other cues to meaning besides statutory text.

That, indeed, is the message of the accommodationists. They point to textualism's escape devices, the absurd results and scrivener's error exceptions, which ameliorate the harshness of textualism's fundamental axiom.¹⁴⁷ They also emphasize that textualists accept the importance of context and will consider statutory purpose in deter-

¹⁴⁵ Nelson devotes attention to the problem of statutory drafting errors and recognizes that it appears to undercut the claim that textualists seek to implement legislative intent, but he concludes that it shows only that textualists are more cautious than intentionalists in concluding that statutory text reflects a drafting error. See Nelson, *supra* note 7, at 377-83. For more on this point, see *infra* Section III.A.

¹⁴⁶ Molot, *supra* note 7, at 35.

¹⁴⁷ See, e.g., Nelson, *supra* note 7, at 356.

mining the meaning of statutory text.¹⁴⁸ These countervailing impulses within textualism, the accommodationists claim, help to show that textualists and other interpreters seek to implement the same ultimate goal,¹⁴⁹ or even reduce the gap between textualism and other interpretive methods to the point where it is difficult to identify any distance between them.¹⁵⁰

The accommodationists' account, however, overlooks a significant problem: the impact of the textualists' axiom cannot be confined to "core" cases. The fundamental axiom that statutory text *is* the law has an inexorable, expansionist force. Once the axiom is accepted, consequences logically follow from it. Illogical, contradictory impulses have long been accepted within textualist theory, but such contradictions cannot be maintained indefinitely within a body of judge-made law. Unlike statutory law, which can incorporate unprincipled compromises, judge-made law works itself pure by yielding to the force of logical argument over time. Contrary to the accommodationists' claims, the trend of scholarship and case decisions is to widen, not narrow, the distance between textualism and other interpretive methods. The implacable force of the prime textualist axiom is spreading beyond the core.

This Part documents the expansionist force of the textualists' prime directive. First, it shows that textualists are gradually recognizing that fidelity to principle requires them to abandon their escape devices, the absurd results and scrivener's error exceptions. Then, it examines the impact of the textualist axiom on consideration of statutory purpose.

A. *Absurd Results and Scrivener's Errors*

Part II, which discussed the primary distinction between textualism and other interpretive methods, did not examine the escape devices that protect textualists from the worst implications of their theory. Courts have long exercised the power to reform "absurd" statutes. When apparently clear statutory text commands a result that is so absurd that "all mankind would, without hesitation, unite in rejecting the application,"¹⁵¹ a court can deviate from the statutory text to avoid the apparent textual result. Courts can also correct a "scriven-

¹⁴⁸ See, e.g., Molot, *supra* note 7, at 35; Nelson, *supra* note 7, at 355.

¹⁴⁹ See Nelson, *supra* note 7, at 355-56.

¹⁵⁰ See Molot, *supra* note 7, at 2.

¹⁵¹ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

er's error" in statutory text.¹⁵² Even stalwart textualists such as Justice Scalia permit these exceptions to the textualist dogma that enacted text simply *is* the law.¹⁵³

Accommodationists point to the absurd results and scrivener's error exceptions as devices that help narrow the gap between textualism and other interpretive methods,¹⁵⁴ and, indeed, to the extent textualists permit these exceptions within their theory, the theoretical and practical distance between textualism and other methods is considerably reduced.¹⁵⁵ The difficulty, however, is that, as scholars have observed, these exceptions—although eminently sensible in practice and in result—contradict textualism's fundamental tenet.¹⁵⁶ If statutory text *is* the law—if the constitutional process of enactment imbues the statutory text with legal force regardless of what anyone intended—then the text cannot cease to be the law when it is absurd or erroneous. Nor does absurd or erroneous text cease to mean what it means.

Textualists and accommodationists sometimes make great efforts to subvert these simple points—indeed, in my respectful opinion, they are capable of considerable self-deception on this score. In an effort to save the exceptions, textualists sometimes claim that, somehow, absurd or erroneous text *means* something other than what it means.

¹⁵² U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993). The Supreme Court's use of the term "scrivener's error" in this context is actually quite recent. The Court's rejection of literal reading of statutory text that produces an "absurd result" is more than a century old, *see, e.g.*, Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1876), but the *National Bank* case is the first in which the Court invoked the term "scrivener's error" in exercising the power of statutory correction. Neither the Court nor any Justice used the term before 1985, when Justice Stevens used it in his opinion in *United States v. Locke*, 471 U.S. 84, 123 (1985) (Stevens, J., dissenting). Older cases from other courts show the term used almost invariably in connection with errors made either by private parties in drafting contracts or similar instruments or by courts or court clerks in connection with judgments. Courts consider themselves empowered to disregard such errors. *See, e.g.*, Christensen v. Felton, 322 F.2d 323, 325 (9th Cir. 1963) (disregarding a scrivener's error in a contract). But at least some older cases use the term with reference to judicial reform of statutes. *See, e.g.*, *In re Deuel*, 101 N.Y.S. 1037, 1038-39 (N.Y. App. Div. 1906) (correcting a "scrivener's error" that resulted in the omission of the term "not" in a statute).

¹⁵³ *See* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (applying the absurd results exception); Scalia, *supra* note 16, at 20-21.

¹⁵⁴ *See, e.g.*, Nelson, *supra* note 7, at 356.

¹⁵⁵ *See* Siegel, *supra* note 24, at 1100-01.

¹⁵⁶ *See, e.g.*, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 45-46 (1994); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 158-59 (1994); Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 29 (1995); Siegel, *supra* note 24, at 1100; Siegel, *supra* note 142, at 333-35.

Nelson, for example, asserts that the meaning of erroneous statutory text is the meaning the text would have with the error corrected. He claims that “[t]extualists can certainly square [the scrivener’s error exception] with their emphasis on ‘objective’ meaning; when an appropriately informed reader would conclude that the statutory text contains a scrivener’s error, textualists can assert that someone seeking the ‘objective’ meaning of the text would naturally correct the error.”¹⁵⁷ The meaning of statutory text does not, however, magically change itself in this way. An appropriately informed reader of text containing a scrivener’s error would *perceive* the error; that is, the reader would perceive the conflict between what the text means and what its author likely intended. But that would not change what the text means, and the very essence of textualism is the decision to enforce the meaning of the text even when it conflicts with likely legislative intent.

The Class Action Fairness Act, discussed in Part II, provides an example.¹⁵⁸ If ever a statute contained a clear drafting error, CAFA was it. But there is no doubt about what the statutory text *means*. The statutory provision permitting appeals to be accepted so long as they are brought “not less than 7 days” after entry of the district court’s order does not mean “not more than 7 days.”¹⁵⁹ Five courts of appeals have reformed the text by ruling that it would be implemented *as though* it read “not more than 7 days,”¹⁶⁰ but they did not have the audacity to claim that that was the *meaning* of the statutory text. At least four of the courts clearly recognized that the text had an evident meaning from which the court was departing but held that the departure was justified.¹⁶¹ Thus, the absurd results and scrivener’s error exceptions,

¹⁵⁷ Nelson, *supra* note 7, at 356; *see also* Scalia, *supra* note 16, at 20 (“The objective import of such a statute is clear enough . . .”).

¹⁵⁸ *See supra* Part II.

¹⁵⁹ The case is different from cases in which appropriate attention to context can provide the necessary clue to textual meaning. *See, e.g., infra* notes 195-97 and accompanying text. Here, the context indicates that the statutory phrase “not less than 7 days” conflicts with the likely legislative intent, but it does not change the meaning of the phrase.

¹⁶⁰ *See cases cited supra* note 132.

¹⁶¹ *See Morgan v. Gay*, 466 F.3d 276, 278-79 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006), *reh’g denied*, 448 F.3d 1092 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). The fifth court did say, “We join our sister circuits in interpreting the statute to mean ‘not *more* than 7 days,’” *Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008), which could be understood as saying that the court really held that to be the *meaning* of the statutory text. But the court’s use of the term “interpreting” leaves

which permit such correction, are incompatible with the textualist axiom that statutory text *is* the law.¹⁶²

Despite this fundamental incompatibility, textualism and these exceptions coexisted for a long time and, indeed, still coexist today. The reason is evident. The exceptions rescue textualism from its worst outcomes. No one wants to do anything absurd. It also seems silly to make the outcome of real cases, which affect the fortunes of real parties, turn on a slip of the pen. In the *Seinfeld* episode in which George insists that the correct answer to the Trivial Pursuit question “Who invaded Spain in the eighth century?” is “the Moops” because that is the text printed on the card,¹⁶³ the suggestion that anyone would adhere so strictly to the controlling text, even in the context of a mere game, is, literally, a joke. It seems even sillier to suggest that there must always be strict adherence to erroneous text in cases in which the stakes are real. Hence, textualists have traditionally accepted the absurd results and scrivener’s error exceptions to their doctrine in order to make it workable: “[A] bad doctrine plus an inconsistent exception will produce a good result.”¹⁶⁴

However, as noted earlier, it is difficult to sustain a contradiction within judge-made doctrine indefinitely. If a judicial doctrine contains an illogical contradiction, judges and scholars will point it out,

the matter a little unclear, and the court also relied on the “uncontested legislative intent,” *id.* (quoting *Morgan*, 466 F.3d at 277), so the basis of the court’s holding is not entirely certain. The court only devoted a single paragraph to the issue.

¹⁶² It may be true, as Nelson claims, that a certain degree of error correction is inherent in the process of understanding text. If CAFA said that a court of appeals could accept an appeal that was brought “not morr than seven days” after entry of a district court’s order, a faithful reader might correct “morr” to “more,” because “morr” is not a word at all. Even if the erroneous text were an actual word, but a word that led to no grammatical meaning at all—if, for example, the statute permitted acceptance of an appeal brought “not moor than seven days” after entry of the district court’s order—correction to “more” would be appropriate and could still be considered part of faithfully ascertaining (as opposed to changing) the meaning of the text; that is, it could still be consistent with an interpretive method called “textualism.” But this is because the interpreter might validly assume that the text to be interpreted has *some* meaning, and in these examples refusal to correct “morr” or “moor” to “more” would leave a text that has no coherent meaning whatsoever. By contrast, where, as in the actual CAFA, the text has a perfectly grammatical meaning, correcting even an obvious error necessarily changes, rather than ascertains, the meaning of the text. Such change is inconsistent with the fundamental axiom of textualism. Indeed, in accordance with the progressive radicalization of textualism that this Article chronicles, one might foresee a day when textualists would reject even the correction of errors that leave text with no meaning. See *infra* note 304.

¹⁶³ *Seinfeld*: *The Bubble Boy* (NBC television broadcast Oct. 6, 1992).

¹⁶⁴ Eisenberg, *supra* note 156, at 29.

and the force of their criticism will create pressure to reform the doctrine. By virtue of such criticism and reform, judge-made law works itself pure over time.¹⁶⁵

That is just what is happening to textualism. Professor Manning's recent article, *The Absurdity Doctrine*,¹⁶⁶ provides an example of textualist theory working itself pure. Manning acknowledges that the absurdity doctrine has existed since "the earliest days of the Republic" and "has flourished even during the most textually oriented periods of the Court's history."¹⁶⁷ Despite its impressive pedigree, however, Manning concludes that recent intellectual and judicial developments have "undermined the doctrine's . . . foundations"¹⁶⁸ and that the doctrine "rests on dubious constitutional grounds."¹⁶⁹ Manning relies primarily on the textualists' realist attack on intentionalism: he observes that the complexities of the legislative process make it difficult for courts to know that some apparently absurd statutory text is not in fact the result of strategic behavior or compromise among interest groups.¹⁷⁰ Therefore, he concludes, courts should "enforce the clear terms of the statutes that have emerged from that process."¹⁷¹

On somewhat different grounds, Manning's colleague, Professor Adrian Vermeule, reaches a similar conclusion in his book, *Judging Under Uncertainty*.¹⁷² Vermeule observes that interpretive techniques other than simply enforcing plain text have definite *costs*, but, he claims, we cannot empirically know whether they have any real *benefit*: they might lead courts astray just as much as, or more than, they assist courts in interpreting statutes correctly.¹⁷³ Courts applying the absurd results exception might mistakenly conclude that a statutory application is absurd because they do not sufficiently appreciate the "relevant policies or legislative purposes" behind the statute.¹⁷⁴ Therefore, he concludes, "[w]hen the statutory text directly at hand is clear and spe-

¹⁶⁵ See *supra* note 17 and accompanying text.

¹⁶⁶ Manning, *supra* note 20.

¹⁶⁷ *Id.* at 2388.

¹⁶⁸ *Id.* at 2390.

¹⁶⁹ *Id.* at 2454.

¹⁷⁰ See *id.* at 2390.

¹⁷¹ *Id.* In a footnote, Manning admits the possibility of applying the scrivener's error doctrine, but he suggests that it should be limited to cases involving ungrammatical or internally inconsistent statutory text—for example, when a statute contains a cross-reference to the wrong statutory section. See *id.* at 2459 n.265.

¹⁷² VERMEULE, *supra* note 35.

¹⁷³ *Id.* at 192-205.

¹⁷⁴ *Id.* at 20, 38-39.

cific, judges should stick close to its surface or apparent meaning, eschewing the use of other tools to enrich their sense of meaning, intentions, or purposes.”¹⁷⁵

Manning and Vermeule reach their rejection of the absurdity principle more on the basis of *realist* arguments than on the basis of textualism’s *formalist* assertion that statutory text is the law.¹⁷⁶ A recent essay by Professor John Nagle, another textualist, provides an even more quintessential example of textualist doctrine working itself pure on the basis of its formalist axiom.¹⁷⁷ Nagle previously made arguments that attempted merely to *cabin* the absurd results exception by insisting that it be limited to cases involving true absurdity and not mere unreasonableness. Now, he explains that, on reflection, he finds these previous efforts unsatisfactory.¹⁷⁸ After further thought, Nagle has concluded that the absurd results and scrivener’s error exceptions “conflict with the theoretical argument for textualism.”¹⁷⁹ Nagle asks, “If statutory text is paramount, then why should the results matter? . . . [A]voiding any substantive results is in serious tension with the entire textualist project.”¹⁸⁰ Therefore, he concludes that textualists should reject the absurd results and scrivener’s error exceptions: when statutory text is unambiguous, the result of applying it should “become irrelevant to the textualist.”¹⁸¹

These scholars’ conclusions show textualism working itself pure. At the very moment when Professor Molot claims that “[i]n scholarship and case law alike, what one finds is convergence of opinion,”¹⁸²

¹⁷⁵ *Id.* at 183.

¹⁷⁶ Manning also relies on formalist, constitutional reasoning that draws on the bicameralism and presentment requirements of Article I, Section 7, although his reasoning is more subtle than simply asserting that, by virtue of these requirements, statutory text *is* the law. See Manning, *supra* note 20, at 2431-46. Vermeule eschews constitutional justification and reaches his conclusions solely on institutional and empirical grounds. See VERMEULE, *supra* note 35, at 10, 30.

¹⁷⁷ John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, 2002, <http://www.bepress.com/ils/iss3/art15>.

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2-3.

¹⁸¹ *Id.* at 2. Nagle also relies on some more pragmatic arguments: he claims that the absurd results exception undermines the role of Congress in correcting its own mistakes, *id.* at 3-4, wastes the time of courts and advocates who must consider whether the exception applies in any given case, *id.* at 5, rarely comes up anyway, *id.* at 5, and could be done without, *id.* at 8. But he is clear that the theoretical clash between the absurd results exception and the rule that statutory text is the law is a prime basis for his rejection of the absurd results principle. *Id.* at 1-2.

¹⁸² Molot, *supra* note 7, at 35.

in fact one sees a *widening* gap between textualism and other interpretive methods. Textualists are widening the gap by rejecting the escape devices that, for decades, protected them against their own worst excesses. They are doing so, not because they are “aggressive textualists,”¹⁸³ nor because they have some unfortunate need to “keep the textualist revolution alive”;¹⁸⁴ they are doing so *because textualism demands it*. They are doing so because judicial doctrines cannot contain logical contradictions indefinitely. The law will work itself pure. Textualists have, in the end, yielded to the force of the arguments made by textualism’s critics. Once one accepts as an axiom that statutory text *is* the law, the absurd results principle is inconsistent with the axiom and its rejection is inevitable.

No court has rejected the absurd results exception as thoroughly as these scholars have, but some judges have rejected a good part of the judicial power to correct scrivener’s errors. Again, the CAFA error provides an example.¹⁸⁵ Judge Bybee and the judges who joined him, while not absolutely rejecting the scrivener’s error exception, limited the exception to cases involving “obvious clerical or typographical errors,”¹⁸⁶ which would not apply to a statute that “is fully grammatical

¹⁸³ *Id.* at 48.

¹⁸⁴ *Id.* at 43.

¹⁸⁵ The CAFA error provides a good illustration of the distinction between the absurd results doctrine and the scrivener’s error doctrine. As I have previously explained, *see* Siegel, *supra* note 142, at 326-32, the doctrines embody subtly but significantly different assertions about judicial power. The absurd results exception, at least according to the more stringent textualists, applies where a statute as written could not serve *any* plausible purpose without regard for the legislature’s *actual* purpose. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (“It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law.”). The scrivener’s error exception applies where it is obvious that the statutory text deviates from legislative intent and it is also obvious what the legislature intended, without regard to whether the result following from the statutory text would be absurd. *See* Siegel, *supra* note 142, at 326-32; *see also* Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 56-57 (2006). Although an absurd result may certainly follow from a scrivener’s error, so that both exceptions may apply to the same statutory text, either exception may also apply when the other does not.

CAFA’s error does not produce a result that is *absurd*; as noted above, *see supra* note 123 and accompanying text, there are situations in which Congress imposes a waiting period before a party may take some action, and Congress could, theoretically, have intended to do so in CAFA. But surely the text is erroneous, and surely it is clear what Congress intended.

¹⁸⁶ *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (Bybee, J., dissenting).

and can be understood by people of ordinary intelligence.”¹⁸⁷ Judge Bybee made clear that he thought it necessary thus to limit the scrivener’s error exception almost to the vanishing point because of the formalist basis of textualism. Permitting judicial correction of the statute, he said, “ignored the deference we must give to the supremacy of the legislature”¹⁸⁸ and violated the principles that “[w]here [a statute’s] language is plain and admits of no more than one meaning the duty of interpretation does not arise”¹⁸⁹ and that “the courts’ role is to give effect to statutes as Congress enacts them . . . not . . . to assess whether a statute is wise or logical.”¹⁹⁰

Again, we see textualism working itself pure. In earlier days of the textualist revival, even those who thought of themselves as textualists might cheerfully have made an exception for a statute such as CAFA, “where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made.”¹⁹¹ Today, however, even in the face of a most obvious slip of the pen, Judge Bybee and those who joined him would stand on the statutory language and the principle that a court cannot “rescue Congress from its drafting errors.”¹⁹² Soon enough, textualist judges will be calling for the complete abolition of the absurd results and scrivener’s error exceptions.

Once again, this is happening not because these judges are hot-heads devoted to keeping the textualist revolution alive, but simply because they are textualists. In an earlier day, textualists somehow maintained separate mental compartments for the axiom that statutory text *is* the law and for the exceptions that allowed courts to reach sensible rulings in the face of absurdity or error. But the textualist axiom has inexorable force. If one really accepts it, the absurd results and scrivener’s error exceptions have to go. The contradictions between them

¹⁸⁷ *Id.* at 1098. Apparently, these judges would limit the exception to cases in which a scrivener’s error has caused the legislature to produce a nonsensical or ungrammatical sentence (and there are certainly plenty of those, *see, e.g.*, 28 U.S.C. § 158 (2006) (referring to the power of “the court of appeals in which the appeal in pending”)) and to cases of erroneous statutory cross-references. *See Amalgamated Transit Union*, 448 F.3d at 1097 (Bybee, J., dissenting).

¹⁸⁸ *Amalgamated Transit Union*, 448 F.3d at 1099 (Bybee, J., dissenting).

¹⁸⁹ *Id.* at 1096 (alterations in original) (internal quotation marks omitted).

¹⁹⁰ *Id.*

¹⁹¹ Scalia, *supra* note 16, at 20; *see also* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) (“[I]t is a venerable principle that a law will not be interpreted to produce absurd results.”).

¹⁹² *Amalgamated Transit Union*, 448 F.3d at 1098 (Bybee, J., dissenting).

can be sustained for only so long in the face of logical criticism. Scholarly and judicial rejection and limitation of the exceptions is the inevitable result of accepting the formalist starting point of textualism.

B. *Consideration of Statutory Purpose*

The preceding section shows that the fundamental textualist axiom, that statutory text *is* the law, inevitably leads to a widening of the gap between interpretive methods because it logically necessitates rejection of the absurd results and scrivener's error escape devices. However, a textualist might claim that even this demonstration fails to uncover a serious problem. After all, although courts frequently discuss these exceptions, cases in which the exceptions actually lead courts to depart from statutory text are rare.¹⁹³ Much more frequently, statutory language does not clearly dictate an absurd result and occasion for application of the absurd results exception does not arise. Hence, the textualist rejection of the absurd results principle, while theoretically interesting, might be regarded as being of little practical importance.

A more frequently recurring question is the degree to which consideration of context and statutory purpose can influence the construction of statutory text. The accommodationists might claim that the gap between interpretive goals or methods is truly narrowing, as textualists have come to recognize and accept the importance of context and purpose in statutory construction. Hence, the accommodationists might still claim to have the better perspective on what is happening in the interpretation wars.¹⁹⁴

In fact, the expansionist force of the textualist axiom is not limited to knocking out the absurd results and scrivener's error exceptions. It also impacts consideration of statutory purpose. Once again, this result follows from the combination of a dogmatic and uncompromising axiom, plus the inexorable force of logic that drives judicially created law to work itself pure.

¹⁹³ See Nagle, *supra* note 177, at 5 ("[I]t is surprising how difficult it is to locate any recent reported cases in which either the absurd results rule or the scrivener's error rule unequivocally defeated the plain meaning of the statutory text.").

¹⁹⁴ Actually, it is a close question whether rejection of the absurd results principle or of considering purpose in statutory construction would be the more significant development or the better proof of the distance that remains between interpretive methods. Purposive argumentation affects *more* cases, but the absurd results exception has a bigger *impact* on the cases it does affect.

With regard to consideration of context, the accommodationists are correct. Good textualists do not insist that text must be interpreted literally and without consideration of context. They do not insist that a statute covers a situation just because the situation falls within some possible dictionary definition of the statute's terms. Rather, textualists recognize that where a statutory term has multiple meanings, context should inform an interpreter's understanding of which meaning applies. Thus, for example, Justice Scalia dissented when the Supreme Court held that someone who traded a gun for drugs had "use[d]" a firearm in relation to a drug trafficking crime within the meaning of the statute forbidding such use.¹⁹⁵ He observed that, taken in proper context, the term "use" had a narrower meaning because "using a firearm" ordinarily means using the firearm *as* a firearm (i.e., as a weapon).¹⁹⁶ Similarly, Professor Manning has observed that context could resolve some classic statutory conundrums without need for the absurd results exception. For example, with regard to the famous hypothetical prosecution of a doctor under a statute that punished anyone who "drew blood in the streets,"¹⁹⁷ a court, without needing to invoke the absurd results exception and depart from the statutory language, could observe that the phrase "drew blood" means one thing in reference to a doctor and something else in reference to a ruffian. The context "in the streets" tells the court which meaning applies.¹⁹⁸

So textualists do show some respect for the importance of taking words in context. Consideration of purpose is different. Here, as with the absurd results exception, the fundamental textualist axiom that statutory text *is* the law conflicts with respect for purposive interpretation.

The effect is, perhaps, somewhat more subtle. The absurd results exception is patently incompatible with the textualist rule because the exception can cause courts to depart unequivocally from the clear meaning of statutory text. By contrast, consideration of purpose more frequently has only the effect of causing courts to prefer one possible reading of statutory text over another. Even a strict rule of enforcing

¹⁹⁵ *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting); *see also* Scalia, *supra* note 16, at 23-24.

¹⁹⁶ 508 U.S. at 242-44 (Scalia, J., dissenting).

¹⁹⁷ *See United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868) (citing Puffendorf's discussion of this statute). The doctor in the hypothetical is prosecuted for letting the blood of a person who falls down in the street in a fit, even though this treatment was in accordance with the medical practice of the time. *Id.*

¹⁹⁸ Manning, *supra* note 20, at 2461-62.

textual meaning does not immediately appear to forbid consideration of purpose in determining what that meaning is.

Nonetheless, there is tension between the textualist axiom and the practice of considering statutory purpose. Once one postulates that statutory text is the law regardless of what anyone intended and decides to stick with this principle no matter how absurd the result, it follows equally that statutory text is the law whether or not it does a good job of serving its purpose. Indeed, the text is the law whether or not it serves *any* purpose.

Logic, therefore, demands that a textualist not believe that statutory text should receive the construction that best serves its purpose and that textualists would harbor some doubts about considering purpose at all. Statutory text, a textualist would say, should receive the construction that is the best reading of the text. If a meaning can be identified as the best reading without consideration of purpose, and consideration of purpose would lead to a different reading, then the latter reading must, to a textualist, be suspect, because the text, not the purpose, *is* the law.

Indeed, leading textualist judges do look on consideration of statutory purpose with suspicion, and they explicitly link this suspicion to the formalist, textualist view that the enacted text is the law. Justice Scalia observes that “[t]he principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate.”¹⁹⁹ Judge Kozinski reminds us that “Congress enacts statutes, not purposes.”²⁰⁰ Judge Easterbrook notes, “We interpret texts. The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts.”²⁰¹

In a similar vein, Professor Manning explains the disfavored status of purposive arguments within textualism. Manning notes that “modern” textualists regard statutory purpose (if derived from sources other than legislative history) as a relevant ingredient of statutory context. He states, however, that they will give decisive weight to “semantic context,” which indicates how a reasonable person would use language, even when that context conflicts with the “policy context,” which indicates how a reasonable person would fulfill statutory

¹⁹⁹ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part).

²⁰⁰ *In re Cavanaugh*, 306 F.3d 726, 731 (9th Cir. 2002); *see also* *FEC v. Toledano*, 317 F.3d 939, 948 (9th Cir. 2002) (quoting *In re Cavanaugh*, 306 F.3d at 731).

²⁰¹ *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

purpose.²⁰² The reason, again, lies in the constitutional structure, which, Manning observes, contains complexities and veto gates that make it difficult for a legislative majority to seamlessly enact purposes into legislation.²⁰³

Once again, therefore, we see that accepting the fundamental textualist axiom has consequences. The accommodationists present textualism as open to the lessons of other interpretive methods. The formalist axiom of textualism, however, has some logical incompatibilities with these lessons that tend to impede the alleged process of convergence. As the above quotations show, textualists resist arguments stemming from statutory purpose.

These quotations, however, do not demonstrate total textualist refusal to consider statutory purpose. To be fair, it should be noted that the quotations are taken somewhat out of context. A full review of the cases from which they are drawn would show that the statements were made to combat rather strong purposive arguments—for example, the argument that courts are empowered to make exceptions to facially unqualified statutory text in the name of statutory purpose.²⁰⁴ So the quotations do not, by themselves, show that textualists would refuse to consider statutory purpose under more appropriate circumstances—as, for example, when a purposive argument is not “disembodied,” as Judge Easterbrook puts it, but bears on the meaning of particular statutory text.

However, the quotations do show that, to the textualist, arguments rooted in purpose are suspect. They are suspect because of the fundamental textualist belief that statutory text *is* the law. Judge Kozinski did not choose to say, “Even though consideration of statutory purpose plays an important role in the interpretation of statutory text,

²⁰² Manning, *Molot Response*, *supra* note 66, at 76.

²⁰³ *Id.* at 103. Manning’s approach is more realist than formalist. Although he ties his analysis to the constitutional enactment process, his concern does not seem to be that text enacted by that process simply *is* the law so much as that the complexities of the process require compromises and that the necessity for compromise makes it inappropriate to assume that statutes should always be interpreted so as to fulfill their overall purposes.

²⁰⁴ For example, in *Toledano*, the defendant had violated the clear statutory requirement that “[e]very person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution.” 2 U.S.C. § 432 (2006). The defendant argued that his behavior should be excused because it did not implicate any purpose of the statute inasmuch as the treasurer had learned of the contribution in time to file statutorily required reports. *Toledano*, 317 F.3d at 947. It was this argument that the court rejected on the ground that “Congress enacts statutes, not purposes.” *Id.* at 948.

courts cannot, in the name of implementing statutory purpose, simply invent exceptions to otherwise unqualified obligations.” He went further than that. He said, “Congress enacts statutes, not purposes.”²⁰⁵ This stark statement suggests that, where textualist interpreters can perceive meaning in statutory text without consideration of purpose, they would be resistant to departing from that meaning in light of statutory purpose.

Indeed, that is what is happening. Two recent Supreme Court cases provide excellent examples of the progressive radicalization that is inherent in the textualist axiom. Each case shows textualists squeezing out the consideration of purpose that the accommodationists claim textualists accept. In each case, even though the statutory text was less than perfectly clear, the textualist opinions insisted on enforcing an interpretation that was probably the best reading of the statutory text in a vacuum, but almost certainly not the best reading if purpose were also considered.

To understand these cases, and to see the error of the claim that the textualists’ willingness to consider statutory purpose has allowed textualism and other methods to converge, one must pay close attention to the cases and the unfamiliar statutory schemes involved.²⁰⁶ The careful reader will, however, be repaid with an improved understanding of what is happening in the world of statutory interpretation.

1. *Limtiaco*

*Limtiaco v. Camacho*²⁰⁷ provides a good example of the natural radicalization of textualism. The case concerned ambiguous statutory text of the kind that might have taken meaning from purpose. Contrary to the accommodationists’ suggestions, however, the Court determined which possible meaning of the text was best from a purely textual perspective, with hardly any consideration of purpose at all.

Limtiaco arose in Guam, a U.S. territory, and concerned a statutory limitation on the ability of the territorial government to take on debt.²⁰⁸ Guam is subject to the Guam Organic Act, a federal statute, which provides that “no public indebtedness of Guam shall be autho-

²⁰⁵ *In re Cavanaugh*, 306 F.3d at 731.

²⁰⁶ This is an inevitable feature of writing about statutory interpretation. Each example typically requires the reader to learn fine details of a different, and often unfamiliar, statutory scheme. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 354 (2005).

²⁰⁷ 549 U.S. 483 (2007).

²⁰⁸ *Id.* at 485.

rized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam.”²⁰⁹ This provision came into play in 2003, when Guam’s legislature authorized the territory’s Governor to issue \$400 million worth of bonds.²¹⁰ The territory’s Attorney General determined that the bonds would violate the limit imposed by the Organic Act. Because the Attorney General’s approval is required for Guam to enter into a contract,²¹¹ the Governor sought a declaratory judgment from the Supreme Court of Guam regarding the proper interpretation of the Organic Act’s debt limit.²¹²

The critical question was the meaning of the term “tax valuation.” In the opinion of the Governor, the “tax valuation” of any property in Guam was the appraised value of the property.²¹³ The Attorney General, however, understood the “tax valuation” to be the assessed value of the property.²¹⁴ Under Guam law, these two values were different: the *appraised* value of property was supposed to represent the market value, but the *assessed* value was 35% of the appraised value.²¹⁵ The assessed value was multiplied by the tax rate of 0.25% (for land) or 1% (for improvements) to calculate the tax owed.²¹⁶ Because assessed value was only 35% of appraised value, calculating the “aggregate tax valuation” of all property in Guam using the assessed value, as the Attorney General did, resulted in an overall debt limit for Guam that was only 35% of the limit that would be calculated using the appraised value, as the Governor desired.

The Guam Supreme Court agreed with the Governor,²¹⁷ but the U.S. Supreme Court reversed.²¹⁸ Notably, the Court considered the case using almost exclusively semantic, textualist tools. It showed an almost complete disregard for statutory purpose.

The Court consulted dictionary definitions of the terms “valuation,” “assessed valuation,” and “appraised valuation”²¹⁹ and then summarily determined that “[t]hough it has no established definition,

²⁰⁹ 48 U.S.C. § 1423a (2006); *see also* 549 U.S. at 485-86.

²¹⁰ 549 U.S. at 486.

²¹¹ *Id.* at 485-86.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ GUAM CODE ANN. tit. 11, § 24102(f) (2003); 549 U.S. at 486.

²¹⁶ GUAM CODE ANN. tit. 11, § 24103. The assessment and tax values have since been amended. *See infra* note 232.

²¹⁷ *In re* Request of Governor Felix P. Camacho, 2003 Guam 16 ¶ 1.

²¹⁸ 549 U.S. at 492.

²¹⁹ *Id.* at 488-89.

the term ‘tax valuation’ most naturally means the value to which the tax rate is applied.”²²⁰ The Court remarked that “otherwise, the modifier ‘tax’ would have almost no meaning or a meaning inconsistent with ordinary usage. . . . One would not normally refer to a property’s appraised valuation as its ‘tax valuation.’”²²¹ Apart from this straightforward textual parsing, the Court’s only other reasoning consisted of noting that the interpretation “comports with most States’ practice of tying the debt limitations of municipalities to assessed valuation.”²²²

Notably missing from the Court’s opinion was serious consideration of whether either of the two potential interpretations of the statutory term “tax valuation” would serve any plausible statutory *purpose*. The dissent took a very different approach. Justice Souter, writing for four Justices, suggested that, as a purely textual matter, the competing readings of the statute were in such perfect equipoise that only “a coin toss” could decide the true statutory meaning without consideration of purpose.²²³ But the dissent did not so limit itself.²²⁴

The dissent observed that the evident purpose of the statutory debt limitation provision was to prevent Guam from taking on excessive debt (possibly leading to the need for a congressional bailout).²²⁵ Given this purpose, “tax valuation” is better read to mean “appraised value” than “assessed value.” Assessed value is an arbitrary figure over which the Guam legislature has plenary control, whereas appraised value is limited by market reality. Under the Court’s equation of “tax valuation” with “assessed value,” “the Guam Legislature could double the debt limitation without increasing taxes by a single penny, simply by doubling the assessment rate and cutting the tax rate by half.”²²⁶ Indeed, nothing in the Court’s ruling stops the Guam legislature from decreeing that property will be assessed at 200%—or 2000%—of market value, again cutting the tax rate proportionally so that actual taxes do not change.²²⁷ The legislature could increase Guam’s debt limit to any desired figure without any effect on taxes.

²²⁰ *Id.* at 489.

²²¹ *Id.* at 489-90.

²²² *Id.* at 491.

²²³ *Id.* at 492 (Souter, J., concurring in part and dissenting in part).

²²⁴ *Id.*

²²⁵ *Id.* at 495.

²²⁶ *Id.*

²²⁷ *Id.* at 495 n.5.

Thus, the Court's reading of the phrase "tax valuation" produces a statute that serves no purpose. Because assessed valuation is an arbitrary figure, controllable by the territorial legislature, reading it into the Guam Organic Act produces a debt limit that is no limit at all.²²⁸ It is difficult to imagine why Congress would ever do such a thing.

The Court's only answer to this argument was to assert that "most States have long based their debt limitations on assessed value without incident" and that "a strong political check exists; property-owning voters will not fail to notice if the government sets the assessment rate above market value."²²⁹ This latter statement seems questionable as a factual assertion,²³⁰ and, in any event, it is notable that the Court's total consideration of the purpose consisted of a suggestion that its reading would not *wholly defeat* the statute's evident purpose. The Court did not even acknowledge that limiting Guam's overall debt *was* the statutory purpose. Nor did it identify *any* purpose that it believed *was* served by its reading of the critical statutory term, and it is hard to imagine what such a purpose could possibly be.²³¹ The Court went with its textual instincts and gave hardly any attention to purpose.

Not too surprisingly, Guam reacted to the Court's decision by doing exactly what the dissent suggested. It doubled the rate at which property was assessed and cut the tax rate in half, thereby evading the borrowing limit that the Court's decision supposedly imposed while keeping its

²²⁸ The result is as curious as it would be if Congress had decreed that no state could have a speed limit higher than "fifty-five" but had left it up to each state's legislature to specify the *units* involved, so that a state could have whatever speed limit it wanted simply by specifying that "fifty-five" referred to something other than miles per hour.

²²⁹ 549 U.S. at 491.

²³⁰ The statement is questionable because even though property owners might well notice if the legislature multiplied their assessments by ten, those same property owners would surely *also* notice that their tax had not changed if the legislature simultaneously divided the tax rate by ten. So it is hard to see what "political check" would exist on this maneuver.

²³¹ Guam's Attorney General asserted that the use of assessed value "ties the [Guam] legislature's ability to incur debt to its willingness to tax." 549 U.S. at 495 (Souter, J., concurring in part and dissenting in part). But this is not so: assessed value is an arbitrary figure that has nothing to do with willingness to tax. A legislature that sets assessed value at 35% of appraised value does not display only half as much willingness to tax as a legislature that sets assessed value at 70% of appraised value because the legislature can always adjust the tax rate to achieve the desired level of taxation. By contrast, appraised value is not arbitrary: it is tied to market realities, and taxpayers have an incentive to ensure that the appraised value of their property is not unrealistically high.

actual taxes unchanged.²³² Guam's ability to do this confirmed that the Court's reading of the Guam Organic Act served no purpose.

For our purposes, the key point is not whether the Court or the dissent was correct (although a discerning reader will doubtless have guessed the author's preference) but rather that the Court so thoroughly marginalized the whole question of purpose. Notably, the Court did so in a case in which the statutory text was by no means clear. As the Court itself recognized, there is no established definition for the phrase "tax valuation."²³³ The Court is probably correct that the term most naturally calls to mind the final number which, when multiplied by the tax rate, yields the amount of tax owed (the dissent's suggestion that, if consideration of purpose is excluded, only a "coin toss" could decide the meaning is overstated), but no one could say that the meaning of "tax valuation" is so perfectly clear as to exclude consideration of purpose.²³⁴

In sum, the *Limtiaco* case suggests a textualist methodology that strongly disfavors, if it does not wholly exclude, consideration of statutory purpose. The Court gave almost no consideration to purpose, even though the statutory text was ambiguous and purposive arguments cut strongly against one reading of the statutory text. *Limtiaco* supports the claim that where statutory text has a meaning that seems preferable as a purely textual matter, the textualist interpreter will strongly resist departing from that reading based on consideration of purpose.

2. *Zuni*

*Zuni Public School District No. 89 v. Department of Education*²³⁵ provides another recent example of the natural radicalization of textual-

²³² In 2007, Guam doubled assessed value to 70% of appraised value but cut the tax rate to 0.125% for land and 0.5% for improvements. GUAM CODE ANN. tit. 11, §§ 24102(f), 24103 (2007). Two years later, Guam used the same ploy again. In 2009, Guam raised assessed value to 90% of appraised value but cut the tax rate to 7/72 of 1% for land and 7/18 of 1% for improvements. GUAM CODE ANN. tit. 11, §§ 24102(f), 24103 (2009). Simple multiplication shows that these changes are purely cosmetic and do not alter taxes by a penny. Guam's actions show that its statutory debt limit, as interpreted by the Supreme Court, is no limit at all.

²³³ 549 U.S. at 485-86.

²³⁴ Contrary to the Court's reasoning, reading the term "tax valuation" to mean "appraised valuation" would not drain the word "tax" of meaning. As Justice Souter pointed out, even if the term "tax valuation" referred to appraised value, it would still be limited to the appraised value *actually used for tax purposes*, as opposed to any other appraised value, particularly an appraised value used solely for calculating Guam's debt limit. *Id.* at 492-93 (Souter, J., concurring in part and dissenting in part).

²³⁵ 550 U.S. 81 (2007).

ism. The case provides an excellent illustration of textualists refusing to consider even the most compelling extratextual evidence of statutory intent and purpose. It is difficult to understand the textualist opinion in the case other than as a repudiation of attempts to reconcile the fundamental axiom of textualism with other interpretive methods.

Zuni concerned a program of federal aid to local school districts known as the “Impact Aid” program.²³⁶ The program provides federal financial aid to local school districts that are financially burdened by a federal presence—as, for example, when a federal military base brings large numbers of school-age children to the district.²³⁷ Under the statute, states are generally forbidden from considering this federal aid in determining how much state aid to give to the district. In particular, states may not offset the federal aid by reducing state aid.²³⁸

An exception, however, applies to states that equalize per-pupil school expenditures statewide. A state *can* take federal Impact Aid into account in determining state aid if the U.S. Secretary of Education certifies that the state “equalizes expenditures” among local school districts in the state.²³⁹ Moreover, the statute does not require perfect equalization; it deems that a state “equalizes expenditures” if the difference between the per-pupil expenditures at the school districts with the highest and lowest such expenditures in the state is no more than 25%.²⁴⁰

Finally, the statute also provides that, in determining whether a state “equalizes expenditures” among school districts, the Secretary shall *disregard* certain school districts.²⁴¹ As in a gymnastics competition in which the highest and lowest scores get thrown out, the statute instructs the Secretary to ignore some school districts at the top and bottom in expenditures. Specifically, the statute provides that the Secretary shall “disregard local [school districts] with per-pupil ex-

²³⁶ *Id.* at 84-85; *see also* Impact Aid Act, 20 U.S.C. §§ 7701–7709 (2006).

²³⁷ 20 U.S.C. § 7701; 550 U.S. at 84-85.

²³⁸ 20 U.S.C. § 7709(a); 550 U.S. at 85.

²³⁹ 20 U.S.C. § 7709(b)(1); 550 U.S. at 85.

²⁴⁰ 20 U.S.C. § 7709(b)(2)(A); 550 U.S. at 85. The determination is made with regard to expenditures (or revenues) in the second year preceding the year for which the determination is made. § 7709(b)(2)(A). Also, the statute permits the determination to be made with regard to per-pupil *revenues* as well as per-pupil *expenditures*, *id.*, but the Court referred to per-pupil *expenditures* throughout its opinion.

²⁴¹ 20 U.S.C. § 7709(b)(2)(B)(i).

penditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.”²⁴²

The critical question in the case concerned the meaning of this “disregard instruction.”²⁴³ Obviously, the statute instructs the Secretary to disregard some school districts having the highest and lowest per-pupil expenditures in the state, but exactly how many? The Secretary interpreted the statute to direct that she create a list of the school districts in the state, ranked by per-pupil expenditures, and then disregard school districts at each end of the list that accounted for 5% of the student population in the state.²⁴⁴

The key point to observe is that disregarding school districts that account for 5% of a state’s student population will typically differ from disregarding 5% of the state’s school districts, because school districts can have different sizes. If, for example, a state had one hundred school districts, then the Secretary would disregard 5% of the school districts by simply disregarding five school districts. But under the Secretary’s actual practice, the Secretary might disregard more or fewer school districts. If the list’s outliers were smaller school districts, the Secretary would disregard more than five school districts at each end of the list; if the outliers were larger school districts, the Secretary would disregard fewer than five.²⁴⁵ The Secretary’s interpretation of the disregard instruction can therefore make a crucial difference in determining whether a state “equalizes expenditures” because the more school districts that are disregarded at the extreme ends of the list, the closer the expenditures at the remaining school districts will be. The Secretary’s practice may allow a state to meet the 25% test that would not otherwise meet it.

That is exactly what happened in the *Zuni* case. The case arose in New Mexico, which has eighty-nine school districts.²⁴⁶ If the Secretary,

²⁴² *Id.* The actual statutory text uses the phrase “local educational agencies,” *see id.*, but the Court, throughout its opinion, used the simpler phrase “school districts” in place of “educational agencies.”

²⁴³ 550 U.S. at 86.

²⁴⁴ *Id.*

²⁴⁵ Under either method, the Secretary would have to decide how to handle fractions. That is, whether the Secretary disregarded 5% of school districts or school districts that account for 5% of the state’s student population, the Secretary would have to decide what to do if the 5% limit were reached in the middle of a school district. The statute gives no clear instruction on this point. However, the fractions problem is not relevant to the interpretive issue posed by the *Zuni* case. It was ignored by the Court and will be similarly ignored here.

²⁴⁶ 550 U.S. at 88.

after ranking the school districts by per-pupil expenditures, had disregarded 5% of the school districts at each end of the ranked list, the Secretary would have disregarded only four or five school districts at each end,²⁴⁷ and the remaining school districts would not have met the 25% test.²⁴⁸ However, the populations of New Mexico's school districts vary tremendously: the largest school district has over 83,000 students, but the smallest has just fifty-seven (and that is not 57,000—the smallest school district has fifty-seven students).²⁴⁹ Moreover, the ends of the ranked list were dominated by the small school districts. So, to disregard school districts accounting for 5% of New Mexico's student population, the Secretary disregarded seventeen school districts at the top of the ranked list and six at the bottom.²⁵⁰ The school districts that remained satisfied the 25% test.²⁵¹ Therefore, the Secretary certified that New Mexico "equalizes expenditures" and the state was free to reduce state aid to school districts that received Federal Impact Aid.²⁵²

The Zuni Public School District, a New Mexico school district that lost state funding as a result, challenged the Secretary's decision as inconsistent with the statutory language. This challenge reached the Supreme Court, which split sharply as to the proper interpretation of the statutory disregard instruction. The Court also split sharply on general interpretive methodology, making the case a lovely illustration of the difference between competing methods.

The five-Justice majority upheld the Secretary's interpretation. The Court relied heavily on its perception of legislative intent and purpose. Even before parsing the statutory language closely,²⁵³ the Court noted that the history of the statute provided unusually clear evidence of legislative intent. In an earlier incarnation, the Court noted, the Impact Aid statute did not contain the critical disregard instruction. It simply provided that the Secretary would administratively

²⁴⁷ The choice between four and five would have depended on the Secretary's resolution of the fractions problem. See *supra* note 245.

²⁴⁸ 550 U.S. at 89.

²⁴⁹ Brief for the Federal Respondent at 23, *Zuni*, 550 U.S. 81 (No. 05-15-0) [hereinafter Government's *Zuni* Brief].

²⁵⁰ 550 U.S. at 88.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ The Court noted that it was departing from its "normal order of discussion" by not considering the language first, which it justified on the basis of "the technical nature of the language in question." *Id.* at 90. As Justice Scalia observed in dissent, one also suspects that the Court inverted the normal order because it found the history and purpose arguments so powerful. *Id.* at 108-09 (Scalia, J., dissenting).

define what it means for a state to “equaliz[e] expenditures.”²⁵⁴ The Secretary created the 25% rule and the practice of disregarding school districts accounting for 5% of a state’s student population at each end of the list of school districts.²⁵⁵ The Secretary followed this practice for nearly *twenty years*.²⁵⁶ Then *the Secretary himself* supplied Congress with draft legislation codifying a definition of “equalizing expenditures,” which Congress adopted without relevant change.²⁵⁷ Following this codification, the Secretary continued the prior practice for five more years before the Zuni Public School District challenged it.²⁵⁸ This history strongly suggests that the disregard instruction was intended to codify the Secretary’s longstanding practice.²⁵⁹

Moreover, as the Court discussed at length, consideration of *purpose* also strongly favored the Secretary’s interpretation.²⁶⁰ The evident purpose of the disregard instruction is to have the Secretary, when determining whether a state equalizes expenditures among school districts, disregard an appropriate number of “outliers.” If the “disregard” process did not take the size of school districts into account, the Secretary might be obliged to be unfair. If small school districts dominated the ends of the ranked list (as in *Zuni*), then, particularly in light of how widely divergent in size school districts can be,²⁶¹ the Secretary might have to disregard school districts accounting for only a tiny percentage of the state’s student population.²⁶² As a result, the Secretary would have to require the state to satisfy the equalization requirement with respect to nearly 100% of its students, despite the statutory purpose of disregarding an appropriate number of outliers. This would be unfairly harsh.²⁶³ Contrariwise, if large school districts dominated the

²⁵⁴ *Id.* at 90 (majority opinion).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *See id.*; *Zuni Pub. Sch. Dist. No. 89. v. U.S. Dep’t of Educ.*, 393 F.3d 1158, 1161 (10th Cir. 2004).

²⁵⁹ 550 U.S. at 90-91.

²⁶⁰ *Id.* at 90-95.

²⁶¹ The differences can be even starker than in *Zuni*. In New Mexico, as noted above, the smallest school district has fifty-seven students. Ohio has three school districts that each have no more than *six* students. Government’s *Zuni* Brief, *supra* note 249, at 32 n.12.

²⁶² In *Zuni*, disregarding only 5% of the school districts at each end of the ranked list would have resulted in disregarding less than 2% of the state’s student population, rather than the 10% of the student population allowed by the Secretary’s method. 550 U.S. at 91-93.

²⁶³ *Id.*

end of the ranked list, the Secretary might (if district size were ignored) be obliged to be unfairly lenient because the Secretary might end up applying the equalization requirement to districts that account for only quite a small percentage of a state's students.²⁶⁴ Therefore, the Secretary's interpretation does a better job of fulfilling the evident statutory purpose.²⁶⁵

Despite these strong indications from history and purpose, a blistering, four-Justice dissent written by Justice Scalia would have held that the statutory language unequivocally required the Secretary to disregard 5% of the *school districts* at each end of the ranked list.²⁶⁶ Parsing the statutory text carefully, Justice Scalia concluded that it unambiguously concerned a percentile distribution of school districts.²⁶⁷

Justice Scalia strongly objected to consideration of intent or purpose. He suggested that such "policy-driven interpretation" contradicted "Statutory Interpretation 101."²⁶⁸ Moreover, he justified his interpretive methodology on formalist textualist grounds: he rejected consideration of intent on the ground that "[t]he only thing we know for certain both Houses of Congress . . . agreed upon is the text."²⁶⁹ He also rejected the Court's purposive argumentation, which he recognized as "the core of the opinion."²⁷⁰ He objected that such purposive argumentation "*invariably* accords with what judges think best."²⁷¹ He concluded with a reversion to formalism: "The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail."²⁷²

Zuni is noteworthy in several respects. First, it provides an outstanding example of how legislative history can, at least sometimes, truly clarify legislative intent.²⁷³ When an agency itself proposes language in an area in which the agency has a long-established practice, and continues the practice following adoption of the language, it

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 90-91.

²⁶⁶ *Id.* at 111-12 (Scalia, J., dissenting).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 109-10.

²⁶⁹ *Id.* at 117.

²⁷⁰ *Id.* at 121.

²⁷¹ *Id.*

²⁷² *Id.* at 122.

²⁷³ Scholars have expressed doubts on this score and have suggested that legislative history may be as likely to mislead a court as to help it discern true legislative intent. VERMEULE, *supra* note 35, at 90; Nelson, *supra* note 7, at 363-64.

seems unarguable that the agency, at least, understood the language to codify its practice. When Congress makes no relevant change to the language proposed by the agency, it seems extremely unlikely that the language is the product of an “unrecorded compromise” among factions within Congress.²⁷⁴ Truly, as Justice Stevens remarked, “the legislative history [here] is pellucidly clear.”²⁷⁵

Even more significantly for our purposes, *Zuni*, like *Limtiaco*, shows textualists rejecting purposive arguments on formalist grounds. The accommodationists point to textualist acceptance of purposive argumentation as one factor that shows the identity of textualist and intentionalist goals²⁷⁶ or that has diminished (to the vanishing point) the distance between textualism and other interpretive methods.²⁷⁷ But in fact, Justice Scalia and those who joined him in *Zuni* are deeply suspicious of purposive argumentation. To these Justices, purposive argumentation is just a cover for imposing a judge’s own values,²⁷⁸ and it cannot be squared with the formalist axiom that the text that Congress enacted is the law.²⁷⁹ Again, we see how the textualists’ formalist axiom inexorably squeezes out contrary, accommodating impulses. Where a meaning can be assigned to statutory language without consideration of purpose, textualists are deeply suspicious of allowing purposive argumentation to alter that meaning.²⁸⁰ And again, they are

²⁷⁴ But see Manning, *supra* note 20, at 2417 (suggesting that courts cannot tell whether apparently odd statutory language reflects such an unrecorded compromise).

²⁷⁵ 550 U.S. at 106 (Stevens, J., concurring). Of course, the possibility remains that, notwithstanding how clearly the *agency* intended the language to codify its existing practice, the members of Congress who voted for the language understood it differently. Still, as Justice Stevens observed, the language did come from the agency, and the sponsors of the legislation introduced it “on behalf of the administration,” *id.* at 106 n.2 (internal quotation marks omitted) (quoting 139 CONG. REC. 23,416 (1993)), so the inference that Congress understood itself to be approving the administration’s desires seems a fair one. Certainly it seems extremely unlikely that the language resulted from an “unrecorded compromise” intended by members of Congress to serve goals that could not be perceived by a court.

²⁷⁶ See, e.g., Nelson, *supra* note 7, at 354-55.

²⁷⁷ See, e.g., Molot, *supra* note 7, at 2, 35.

²⁷⁸ *Zuni*, 550 U.S. at 120-21 (Scalia, J., dissenting).

²⁷⁹ *Id.* at 121-22.

²⁸⁰ In fairness, one must note that *Zuni* is in one sense a less perfect illustration of this point than *Limtiaco*. In *Limtiaco*, even the textualist opinion acknowledged that the statutory provision is ambiguous (or at least had no established meaning), *Limtiaco v. Camacho*, 550 U.S. 483, 489-90 (2007), so it is particularly striking that the opinion rejected purposive argumentation. In *Zuni*, there is at least some argument that the statutory text is unambiguously clear, which, to a textualist, might preclude consideration of statutory purpose.

suspicious, not because they are attempting to radicalize textualism²⁸¹ but because suspicion of purposive argumentation is simply inherent in the textualist axiom that statutory text, not purpose, *is* the law.²⁸²

IV. THE FUTURE OF THE INTERPRETATION WARS

The previous Parts suggested that textualism is built around a core axiom that sharply distinguishes it from other interpretive methodol-

Still, a dispassionate analysis of the statutory language at issue in *Zuni* would probably conclude that it is not so perfectly clear as to preclude all purposive argumentation. It is true that when one talks of locating something on a percentile scale, it is usually a percentile scale made up of the class of people or things of which the one being located on the scale is a member. For example, a student who says "my GPA is at the ninety-fifth percentile" implicitly posits a percentile scale made up of the GPAs of a group of students of which the student is a member. So the statutory language at issue in *Zuni* most naturally lends itself to the interpretation given in Justice Scalia's dissent because it most naturally suggests a percentile scale of school districts. On text alone, Justice Scalia had the better interpretation.

But it is not impossible to rank some person or thing on a percentile distribution of a group of which the ranked person or thing is not a member. For example, in a school in which the students belong to various clubs, school rules might give special recognition to "those clubs with average GPAs above the ninety-fifth percentile of GPAs at the school." This rule could mean that one should first consider what GPA is the ninety-fifth percentile of GPAs for all *students* in the school, and then recognize those clubs that have an average GPA above that GPA. The number of clubs qualifying under this rule might be zero (if, for example, students joined clubs on bases unrelated to GPA so that the average GPA of each club would tend to be about the fiftieth percentile of GPAs at the school), or it might be many (if the students with the very highest GPAs tended to congregate in the same clubs). The point is that the rule does not have to call for ranking the *clubs* by average GPA, and then awarding recognition to the clubs with average GPAs at the ninety-fifth percentile of *club* average GPAs (which would always lead to exactly 5% of the clubs being so recognized).

As the Court's opinion in *Zuni* observed, the statutory language at issue calls for a percentile distribution but does not expressly state what population is to make up that distribution. 550 U.S. at 94-95. Thus, it is not implausible that the statute should be understood to require all of a state's *students* to be ranked by per-pupil education expenditures and then to require the identification of the school districts with per-pupil expenditures at the fifth and ninety-fifth percentiles on this list. Such a ranking does require the somewhat artificial imputation to each student of the per-pupil expenditures of the school district where that student attends school, *see id.* at 111-14 (Scalia, J., dissenting), but it is not a wholly implausible reading of the statutory language, and it is the reading that best fulfills the statutory purpose.

In another sense, *Zuni* is the better illustration of the point made in the text because, unlike the majority opinion in *Limtiaco*, the *Zuni* dissent explicitly ties its rejection of purposive argumentation to the formalist aspect of textualism. *Id.* at 119-23.

²⁸¹ See Molot, *supra* note 7, at 43.

²⁸² Incidentally, one interesting conclusion to note from this highly scientific sample of two cases is that Justice Alito is not a textualist. He joined the nontextualist opinion in both *Limtiaco* and *Zuni*.

ogies and that tends to drive it *further* from other methodologies over time. What, then, of the future? This Part suggests that the textualists' formalist axiom will ultimately prove to be their undoing. Legal theories tethered to flawed theoretical axioms must ultimately fail. Textualism's formalist axiom dooms textualism because its logical force prevents textualism from improving itself by adopting the best lessons of other methods. Nor can textualism abandon its formalist axiom, because, if it did, it would cease to be textualism.

Other methods, by contrast, are in a better position to absorb the best lessons of textualism without repudiating their core principles. The prime directives of intentionalism and purposivism are less dogmatic and uncompromising than that of textualism. Even while holding to the goal of implementing legislative intent or purpose, these other methods are capable of absorbing the lesson that, sometimes, legislative intent or purpose is an empty construct. The flexibility that follows from not being tied to an uncompromising dogma makes intentionalism and purposivism superior to textualism and suggests that they will ultimately win the interpretation wars.

A. *The Future of Textualism*

Textualism, this Article has suggested, is doomed to veer further away from other methods of statutory interpretation as the implications of its fundamental axiom become better understood. Textualists are gradually realizing that they must choose between their formalist axiom and inconsistent exceptions—and they are choosing to stick with the axiom. Similarly, they are rejecting consideration of statutory purpose when it is in tension with their axiom. The choice to stick with the formalist axiom will necessarily condemn textualists to reaching absurd results, to enforcing drafting errors, and to implementing interpretations that do not fulfill statutory purposes. All of these problems will redound to the detriment of textualism as an interpretive method.

1. Textualism's Problem

Textualism's fundamental problem is that, as the cases discussed in this Article suggest, the formalist axiom is wrong. It is tempting, but too simplistic, to insist that statutory text *is* the law. Centuries of judicial practice confirm limited judicial authority to depart from sta-

tutory text in appropriate cases.²⁸³ Although such cases are rare enough to be curiosities,²⁸⁴ they are common enough to show that statutory text is not the ultimate determinant of the law. The pedigree of the judicial practice is a sufficient basis to reject the argument that the Constitution demands adherence to the formalist axiom; the “judicial power” that the Constitution confers on the federal courts should include the power to act as courts have traditionally acted.

Moreover, once the radicalization inherent in the formalist axiom makes it clear that choosing textualism requires imposing absurdity, perpetuating errors, and enforcing interpretations that fail unnecessarily to fulfill statutory purpose, it will be clear that there is a sufficient reason for rejecting textualism as an interpretive choice. Textualism is already a minority position among judges and scholars. It can only become less attractive as its formalist axiom causes it to become more radical and unworkable.

Nonetheless, it might, perhaps, be thought appropriate to maintain the formalist axiom as a legal fiction—a polite form of words that courts would recite as a gesture of respect for the legislature, even though they would understand that the axiom is not strictly true. Such a practice would be harmless enough in most cases. Although it is not true to say that statutory text *is* the law, saying so makes no difference most of the time because most of the time statutory text is, at least, identical to the law.²⁸⁵

The problem with maintaining such a fiction, however, would be the problem that is inherent in any legal fiction: a fiction is “wholly safe only when it is used with a complete consciousness of its falsity.”²⁸⁶ Judges would always be tempted to believe the fiction, and “[a] fiction taken seriously[,] i.e., ‘believed[,]’ becomes dangerous and loses its utility.”²⁸⁷ As this Article has shown, once the formalist axiom is believed, consequences inevitably follow from it. These consequences inexorably push textualist interpretation further away from other in-

²⁸³ See Eskridge, *supra* note 37 (highlighting historical use of nontextualist sources); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498-1511 (1987) (detailing arguments supporting nontextualist readings); Siegel, *supra* note 24, at 1094-98 (discussing recognition of interpretational flexibility in British and American law); see also *supra* note 30 and accompanying text.

²⁸⁴ See Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 404 (2007).

²⁸⁵ Most of the time, all of the approaches to interpretation of a statute lead to the same result, which is the result indicated by the statutory text. *Id.*

²⁸⁶ L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 370 (1930).

²⁸⁷ *Id.*

interpretive methods. Textualism will be unable to survive in the long term if it is yoked to a false axiom from which such dangerous consequences follow.

2. Textualism's Useful Lesson

But for all that, textualism has demonstrated that it has useful lessons to teach the other methods. Although the *formalist* axiom of textualism is incorrect and causes much trouble, textualism's *realist* attack on intentionalism and purposivism taught lessons well worth learning. Textualists rightly complained that intentionalist and purposivist statutory interpretation had gotten out of hand in the middle of the last century. Courts were reading legislative history as though it were statutory text and implementing perceived legislative intent and statutory purpose that was wholly detached from statutory text. Courts were disregarding the many practical realities of the legislative process that can make legislative intent or purpose false constructs. They were ignoring the compromises that are necessary to the passage of legislation and that can impede the smooth enactment of legislative intent or purposes.

Textualists usefully called attention to these intentionalist and purposivist excesses. They reminded all interpreters of the importance of statutory text. Today, even interpreters who call themselves intentionalists or purposivists have heeded the textualists' realist attack.²⁸⁸ It is in this limited sense that, as I have previously remarked, "we are all textualists now."²⁸⁹

3. A Solution for Textualism?

If this is true, then it might seem that the solution for textualists is simple: all they need to do is to abandon the flawed *formalist* aspect of textualism while clinging firmly to its *realist* aspect. Although even the realist aspect of textualism has led some scholars to stark conclusions such as rejecting the absurd results exception,²⁹⁰ such conclusions are

²⁸⁸ See Molot, *supra* note 7, at 32-33 (discussing how many intentionalists and purposivists now "heed textualism's warnings"). Indeed, an interpreter who has given enough thought to interpretive methodology to call himself an "intentionalist" or "purposivist" has probably received so much exposure to the valid, realist logic of textualism that he probably pays more attention to statutory text than interpreters who simply go about interpretation without thinking deeply about the process.

²⁸⁹ Siegel, *supra* note 24, at 1057.

²⁹⁰ See *supra* note 176 and accompanying text (describing Manning and Vermeule's rejection of the absurd results exception).

not inevitable. The formalist aspect of textualism leads logically and inexorably to undesirable conclusions,²⁹¹ but the lessons of the realist aspect could be confined to their useful reach.²⁹²

However, it seems unlikely, and perhaps even impossible, that textualism could be decoupled from its formalist axiom. There are two chief reasons for this. First of all, textualists seem to have no intention of abandoning formalism. To the contrary, they revel in it. Consider Justice Scalia: "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic!* The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men."²⁹³

Other leading textualists, although not taking quite the same degree of glee in classifying themselves as formalists, also explicitly tie their adherence to textualism to its formalist axiom. Judge Easterbrook, for example, has explained that his objection to judicial use of legislative history is not that legislative history may be unreliable but rather the implicit assumption that statutory text is "but an imperfect reflection of the real law."²⁹⁴ Judge Easterbrook cannot accept this view because he believes that "[t]he words of the statute, and not the intent of the drafters, are the 'law.'"²⁹⁵ Similarly, Judge Kozinski, although giving several reasons for his adherence to textualism, relies on formalism:

1. The two Houses and the President agree on the text of statutes, not on committee reports or floor statements. To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law.

. . . .

3. Even if there were such a thing as congressional intent, and even if it could be divined, it wouldn't matter. What matters is what Congress does, not what it intends to do.²⁹⁶

²⁹¹ See *supra* Part III.

²⁹² See *infra* Section IV.B (discussing the future of intentionalism and purposivism).

²⁹³ Scalia, *supra* note 16, at 25; see also *id.* at 26 ("A statute cannot go beyond its text.' Hooray for that." (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950))).

²⁹⁴ Easterbrook, *supra* note 16, at 60.

²⁹⁵ *Id.*

²⁹⁶ Kozinski, *supra* note 134, at 813; see also *In re Cavanaugh*, 306 F.3d 726, 731-32 (9th Cir. 2002) ("Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals.").

To be sure, this adherence to formalism is not universal among those who call themselves textualists. Professor Manning, for example, rejects mere reliance on textualism's formalist axiom as overly simplistic and builds his version of textualism on realist premises.²⁹⁷ He relies on the constitutional enactment process but does so by carefully drawing structural inferences from its purposes and not by simply declaring that what emerges from the enactment process *is* the law.²⁹⁸

There are many voices in the interpretation debate, and none of them has exclusive authority to define "textualism." The above quotations, however, sufficiently demonstrate that adherence to textualism's formalist axiom is prevalent, if not universal, among self-identified textualists. Certainly Justice Scalia, who perhaps plays a bigger role in defining textualism than anyone else, adheres to the formalist axiom wholeheartedly. In light of the views of these leading textualists, it seems unlikely that the textualist movement as a whole could be convinced to retreat from textualism's formalist axiom.

Moreover, perhaps an even more important question is whether a textualism that does not proceed from the formalist axiom can properly be called "textualism." One could, of course, try to build a theory of textualism solely from its realist premises. Indeed, Professor Manning does so. He asserts that courts must adhere to statutory text, not because the text *is* the law, but because of a realist appraisal of the characteristics of the legislative process—characteristics which underlie the purposes of the constitutional commands of bicameralism and presentment.²⁹⁹ Manning sees the bicameralism and presentment requirements as serving the purpose of giving minorities (particularly the minority of small-state residents) power to block legislation and thus to insist on favorable compromises.³⁰⁰ Courts must respect bargains recorded in legislative text, lest they undermine the bargaining power the Constitution has given to minorities.³⁰¹

However, even accepting this point, the key question becomes whether the presumption that legislative text properly reflects the bargain that emerged from the legislative process is rebuttable or irrebuttable. Professor Manning's recent scholarship suggests that he believes it should be irrebuttable. Even in the face of an apparently absurd result, Manning says, a court cannot know whether the result is

²⁹⁷ Manning, *supra* note 37, at 70-78.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 76-77.

³⁰¹ *Id.* at 77-78.

in fact the product of an "unrecorded compromise[]" or some other artifact of the complex legislative process.³⁰² Hence, he appears to conclude, courts must follow statutory text as written, notwithstanding the absurdity of the results.³⁰³

If Professor Manning's conclusion is correct, then his brand of textualism, even though justified on realist rather than formalist grounds, would be indistinguishable from the formalist brand of textualism that this Article has criticized. It would lead to all the same problems—indeed, as just noted, it has already led Manning to rejection of the absurd results doctrine. The same inexorable pressures would ultimately lead to the same rejection of the scrivener's error doctrine and consideration of statutory purpose.³⁰⁴ The resulting brand of textualism would thus be no solution to the problems detailed in this Article.

On the other hand, if the solution is to abandon the formalist aspects of textualism and make the presumptions arising from its realist critique rebuttable, that is, to limit the essence of textualism so that, in effect, it commands, "Remember that statutory text may reflect imponderable legislative bargaining, and therefore follow statutory text unless there is a very persuasive reason not to do so," then it can hardly be called textualism at all. It would then, as Professor Molot claims, become almost indistinguishable from intentionalism or purposivism. After all, even Justice Stevens desires only that the Court recognize that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."³⁰⁵ In other words, the courts should

³⁰² Manning, *supra* note 75, at 2417, 2424-31, 2437-38.

³⁰³ See *id.* at 2485-86 ("[T]he Court should acknowledge that negating perceived absurdities that arise from clear statutory texts in fact entails the exercise of judicial authority to displace the outcomes of the legislative process. . . . [T]he Court should permit such displacement only when the legislature's action violates the Constitution . . .").

³⁰⁴ Manning is apparently willing to countenance a limited scrivener's error doctrine, which would permit correction only of "obvious clerical or typographical errors." *Id.* at 2459 n.265. But really, even if a typographical error resulted in a statute that means nothing at all, how could a court know that this result was not the product of an unrecorded compromise? As Justice Holmes once remarked, "It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective." *United States v. Plowman*, 216 U.S. 372, 375 (1910). Perhaps the unrecorded compromise was to pass a bill that did nothing. Thus, the same argument that causes Manning to reject the absurdity doctrine should logically compel him to reject the scrivener's error doctrine as well.

³⁰⁵ *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 104-05 (Stevens, J., concurring) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

usually follow statutory text but depart from it in rare cases when there is a very persuasive reason.

In short, the inherently radical nature of textualism's formalist axiom makes textualism incapable of reforming itself so as to achieve a useful accommodation with other interpretive methods; indeed, it must inevitably lead to further and further distance between the methods and make textualism more and more unworkable as an interpretive doctrine. Many leading textualists have no intention of abandoning the formalist axiom, but even if they did, and reconstructed textualism solely on realist grounds, the reconstruction would not help if it produced a doctrine subject to all the same difficulties as the textualism that proceeds from the formalist axiom. Textualists can make their doctrine workable only by abandoning the formalist axiom *and* softening the realist critique to the point where textualism could hardly be called textualism at all. This is why textualism is ultimately doomed to lose the interpretation wars.

B. *The Future of Intentionalism and Purposivism*

Intentionalism and purposivism, by contrast, are better placed to absorb the best lessons of their rival. Their fundamental axioms are less dogmatic and inflexible. They can, therefore, moderate themselves without being untrue to their core principles.

As this Article has shown, the fundamental axiom of textualism is logically incompatible with necessary accommodations such as the absurd results and scrivener's error doctrines. By contrast, even assuming that the fundamental axiom of intentionalism is "the intent is the law," and that of purposivism is "the purpose is the law" (each of which is something of an overstatement), these statements are not so inflexible as the textualist axiom. These methods are therefore more open to improvement based on textualist criticism.

Even the purest intentionalist, who firmly believes that the goal of statutory interpretation is to seek out and enforce legislative intent,³⁰⁶ must acknowledge, in the face of the textualists' realist attack, (1) that a legislature is a multimember institution to which attribution of "intent" can be dangerous, (2) that the complex bargaining necessary to the enactment of statutes may produce a statute that implements multiple, conflicting intentions, and therefore (3) statutory text is usually the best

³⁰⁶ See, e.g., Wald, *supra* note 29, at 301 (identifying her desire "to advance rather than impede or frustrate the will of Congress" (emphasis omitted)).

evidence of legislative intent. The staunchest purposivist would have to make similar concessions with regard to legislative purpose.

Intentionalists and purposivists, by absorbing these textualist lessons, can moderate and improve their interpretive philosophies. And yet intentionalism does not cease to be intentionalism, nor does purposivism cease to be purposivism, by accepting these accommodations. Accepting the accommodations entails no logical contradiction, such as exists between textualism's formalist axiom and the absurd results exception. One can still believe that the ultimate goal of statutory interpretation is to implement legislative intent while recognizing that sometimes a legislature has no intent on a particular question and that sometimes intent is impossible to discern other than by following statutory text. One can still believe in reading statutes so as to implement their purpose while recognizing that few statutes seek to serve their purpose at any cost and that legislative bargaining produces compromises that serve conflicting purposes. Thus, even intentionalists and purposivists can, and often will, recognize that following statutory text may be the only solution to a particular case.

Textualists lack a similar "out." There are cases in which legislative intent or purpose may be empty or impossible to discern, but there is never a statute with no text. The axiomatic belief that such statutory text *is* the law therefore always produces a collision that blocks accommodation in cases where the text deviates from likely legislative intent or purpose.

Moreover, intentionalism and purposivism can accept accommodations with textualism's realist critique while still maintaining their distinctiveness in terms of actual interpretive results. Manning correctly points out that it may be difficult for courts to determine whether an odd, or even apparently absurd, result suggested by statutory text indicates that the text contains an error or whether it arises from a compromise—perhaps an unprincipled and illogical compromise—that was essential to the statute's passage.³⁰⁷ But just because this task is *difficult* does not mean that it is *impossible*. Sometimes the extratextual considerations are almost irrefutable.

For example, even the staunchest textualist would find it difficult to claim, with a straight face, that the text of CAFA reflects an unrecorded compromise between those who wanted class action appeals

³⁰⁷ See Manning, *supra* note 20, at 2417 (rejecting the intentionalist premise "that judges can reliably ascribe an odd statutory application to legislative inadvertence on the assumption that the problem could and would have been corrected had it come to light").

hurried along and those who wanted them slowed down. The evidence of statutory error is overwhelming.³⁰⁸ Similarly, the history of the Impact Aid statute considered in *Zuni* provides uniquely clear evidence that the statutory text was designed to codify a preexisting administrative practice. Thus, even while recognizing that a multi-member legislature often has no discernible intent or purpose that speaks to the interpretive question presented by a particular case, intentionalists and purposivists can recognize that *sometimes it does*, and permit themselves to be influenced by it.

Of course, allowing such influence will inevitably lead to some mistakes. There will be some false positives (cases where courts identify as a judicially revisable error something that was really a legislative compromise that they were bound to follow) and some false negatives (where courts decide that they are bound to follow statutory text strictly when they should have followed discernible legislative intent). Manning's prescription—that courts universally assume that apparently absurd results reflect unrecorded legislative compromises—would, necessarily, eliminate all the false positives, but it seems undeniable that it would increase the false negatives.

Although he does not expressly say so, Manning appears to believe that a flat policy of not reforming statutes to avoid absurd results will lead to fewer *overall* errors, as the elimination of false positives will outweigh the increase in false negatives. Nelson articulates this argument expressly,³⁰⁹ and Adrian Vermeule makes it the centerpiece of his entire interpretive philosophy.³¹⁰ It *could* be true—the decrease in false positives under a purely textualist regime could outweigh the increase in false negatives—but it seems very counterintuitive. It assumes that the best regime is one in which judges do not even *try* to come to the correct result.

As I have previously explained in detail,³¹¹ institutional features of courts suggest that they are well positioned to detect certain situations in which deviation from the best textual reading of a statute is appropriate. In particular, the fact that courts encounter and interpret sta-

³⁰⁸ See *supra* subsection II.B.2.

³⁰⁹ Nelson, *supra* note 7, at 381-82. Nelson does not actually adopt the argument, but explains its appeal for those who favor rule-based interpretive methodologies. *Id.*

³¹⁰ Vermeule's book is based on the argument that, even if everyone agreed that the goal of interpretation is to implement legislative intent, courts should still always apply clear statutory text because no one can empirically prove that interpretive rules that permit departures from clear statutory text will not lead to more overall errors than a rule of sticking to statutory text in all cases. VERMEULE, *supra* note 35.

³¹¹ See Siegel, *supra* note 284, at 419-23.

tutes at the moment of their implementation puts them in a good position to detect statutory absurdities and deviations from background understandings that escaped notice in the hubbub of the legislative process.³¹² For this reason, it seems appropriate to posit that judicial efforts to reach the correct result in statutory interpretation will not be in vain and will not lead to a larger number of overall errors than a policy of strictly following statutory text no matter what.

In any event, the main point is that intentionalism and purposivism, unlike textualism, can accept the best lessons of their rival method and reach an accommodation that improves the performance of the judicial function without compromising or contradicting their fundamental axioms. Their fundamental axioms do not inexorably cause radicalization as the law works itself pure. For these reasons, intentionalism and purposivism are better positioned than textualism to win the interpretation wars.

CONCLUSION

The textualists' *realist* attack on intentionalist and purposivist premises has done much good that should be retained. But the dogmatic and uncompromising nature of the textualists' *formalist* axiom makes textualism a menace to justice. The formalist axiom is wrong, it makes textualism unworkable, and its effects get worse over time. The accommodationists' efforts are doomed to fail. Textualism without its formalist axiom is not textualism, and the hydraulic pressure of the formalist axiom must inevitably cause more and more trouble as textualism works itself pure. The inexorable radicalization of textualism will cause it to lose the interpretation wars.

³¹² *Id.*